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*Bar Association/*  
*Governor's*  
*Committee on the*  
**ALCOHOLIC CLIENT**

*Final Report*

GOVERNMENT DOCUMENTS  
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**FINAL REPORT OF THE MASSACHUSETTS  
BAR ASSOCIATION/GOVERNOR'S  
COMMITTEE ON THE ALCOHOLIC CLIENT**

**MICHAEL S. GRECO, Esq.,  
Chairman**

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This volume discusses agencies and groups that provide services to individuals with alcohol and/or drug related problems. It should not, however, be taken as a recommendation or warranty of any agency or group by the Commonwealth of Massachusetts or the Massachusetts Bar Association, or their officers, agents or employees, or by any of the contributors to this volume.

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## INTRODUCTION

The Massachusetts Bar Association/Governor's Committee on the Alcoholic Client is pleased to submit this final report to Governor Michael S. Dukakis, to the Board of Delegates of the Massachusetts Bar Association (MBA), to the lawyers and judges of Massachusetts, and to all Massachusetts citizens. The report culminates the work of our multidisciplinary Committee, jointly appointed in March 1985 by the Governor and the President of the MBA.

The charge given to the Committee was straightforward: to consider ways in which lawyers can better serve the needs and problems of clients whose legal problems are related to the abuse of alcohol or other drugs. In his initial letter to Committee members, Governor Dukakis said:

Increasingly, attorneys are recognizing how uniquely situated they are to serve and help clients whose legal problems, be they civil or criminal, may be symptomatic of personal or family alcohol abuse. The Committee's mandate will be to channel and expand this awareness by documenting and publicizing measures lawyers and the courts can take to address clients' alcohol problems creatively, compassionately and effectively.

The Committee comprised thirty members, and included leaders of the executive, legislative and judicial branches of government; representatives of the legal, medical, and social service communities; representatives of other alcohol-related issue groups; and private citizens. The Committee had the benefit, as well, of input and advice from individuals who are now sober alcoholics.

The Committee early in its existence set forth its goals: to help lawyers and judges (1) identify alcohol and other drug abusing clients; (2) assist clients in solving their underlying alcohol or drug abuse problem, which typically causes the clients' legal problems; (3) become knowledgeable about treatment resources available to alcohol and drug abusing clients; and (4) recommend new approaches, consistent with the Code of Professional Responsibility, to help solve the clients' alcohol or drug problem.

To accomplish its goals, the Committee divided itself into subcommittees which considered the clients' alcohol/drug problems in the context of Criminal Issues (drunk driving and other criminal alcoholic conduct) and Civil Issues (family breakups, workplace problems, and other noncriminal alcoholic behavior).

The lawyer's ethical freedom to render innovative and effective assistance to alcohol/drug abusing clients consistent with the Canons of Ethics was carefully examined by a third subcommittee on Ethical Issues.

A fourth subcommittee on Treatment Resources compiled a first in the nation directory of all alcohol and drug treatment facilities available to clients and to lawyers who wish to refer clients to such treatment centers. The full Committee was pleased to publish the directory in November 1985 under the

title Alcohol and Drug Treatment: A Directory of Resources for Massachusetts Residents. A free copy of the directory was mailed by the MBA to every lawyer in Massachusetts. The Committee acknowledges with gratitude the generous support of the Kemper Group in the printing of this first of its kind directory in the United States.

A fifth subcommittee, the Education Subcommittee, considered and has made recommendations regarding ways in which the findings and conclusions of the Committee can best be communicated to the lawyers and judges of Massachusetts.

In March 1986, the Committee held public hearings in Springfield and Boston. Testimony was received from Governor Dukakis, leaders of every segment of state and local government, lawyers, judges, and professionals having expertise in alcohol and drug related matters. The data resulting from those public hearings is incorporated throughout the chapters of this report.

I speak for each member of the MBA/Governor's Committee on the Alcoholic Client in urging all members of the Massachusetts legal profession to read this Report. We are confident that the recommendations contained in these pages will place lawyers and judges in a position to help solve one of the most devastating, but curable, diseases that ravages our society.

Finally, I want to thank Governor Dukakis, the Chairs of each of our Subcommittees, and each member of the Committee for the caring, commitment, and hope that are reflected in the pages of this final report.

Michael S. Greco, Former President  
Massachusetts Bar Association  
and  
Chairman, MBA/Governor's Committee  
on the Alcoholic Client

November 1986



## CHAPTER I

### SUMMARY OF FINDINGS AND REPORT OF THE MASSACHUSETTS BAR ASSOCIATION/GOVERNOR'S COMMITTEE ON THE ALCOHOLIC CLIENT

At the Massachusetts Bar Association Law Day Program on May 1, 1984, Governor Michael S. Dukakis spoke to the citizens of Massachusetts of his great concern regarding the effect of alcohol and drug abuse on the lives of every man, woman and child in Massachusetts. He spoke of the fact that over seventy (70%) percent of all highway deaths are alcohol related. He stated that more than eighty (80%) percent of the juvenile offenders in our Commonwealth are afflicted with alcohol and other substance abuse problems. He noted that in incidences where physical violence occurs between two parties, including domestic violence, more than sixty (60%) percent involve alcohol and, to a lesser extent, other drugs. Every year one hundred thousand Americans die for reasons directly related to the abuse of alcohol. Most rapes and assault and batteries and most accidental deaths of teenagers can be directly related to the abuse of alcohol or drugs.

Governor Dukakis called upon the approximately 30,000 lawyers of Massachusetts through the Massachusetts Bar Association ("MBA") to focus their attention on the problem of identifying those of their clients who have a problem with alcohol or other drugs, and to work toward solutions to clients' alcohol related problems. The Governor acknowledged that people in financial trouble, or in trouble with their families, marriages and other personal and financial relationships, frequently turn to lawyers for help. In many instances it is the lawyer who first sees the person with alcohol and drug problems and who has the first opportunity to provide genuine help.

The MBA responded to the Governor's invitation to assist lawyers in recognizing and assisting those clients in need of alcohol and drug treatment by forming the Massachusetts Bar Association/Governor's Committee on the Alcoholic Client in March 1985. The Committee consists of thirty men and women who are familiar with the area of alcohol and chemical abuse, particularly as it relates to the law. The Committee includes legislators, judges, members of the Executive branch of state government, law enforcement officials, lawyers and trained alcoholism professionals.

The purpose of the Committee is to assist lawyers in recognizing and identifying clients who have problems with alcohol or drugs, to assist the lawyer in recognizing what he or she can ethically do when he or she identifies such a problem in the client, and to assist the lawyer in referring those clients, and/or members of their families where appropriate, for counseling and treatment. In addition, the Committee has reviewed and made recommendations with regard to other aspects of the legal system involving judges, probation officers, law students and others who come in contact with the alcohol or chemically dependent client.

In order to address the issues before it, the Committee divided itself into four subcommittees: Civil Issues, Criminal Issues, Ethical Issues and Education. In addition, a sub-group led by David Mulligan of the Department of

Public Health, Division of Alcoholism and Drug Rehabilitation, compiled a directory in two separate formats (Statewide and Regional) entitled Alcohol and Drug Treatment: A Directory of Resources for Massachusetts Residents which was published in November of 1985 by the MBA. The Committee thanks the Division of Alcoholism and Drug Rehabilitation for compiling this directory and the Kemper Group for printing it at no charge to MBA members. Approximately 30,000 copies of the directories have been sent, free of charge, to every lawyer in Massachusetts, and to others. Copies of both the Statewide and the five Regional directories are available from the MBA.

Each subcommittee researched the issues with which it was faced, held meetings, reported to the full Committee and, finally, made recommendations pertaining to its particular area. Each subcommittee independently discovered two common facts: the statistics of alcohol and drug related abuse are staggering and the lawyer is often in a unique position to identify the role that such abuse is playing in a client's life and to assist the client in seeking help for the problem.

Consider these staggering statistics:

1. In the area of family violence, statistics derived from 209A (abuse prevention petition) cases indicate that eighty-three (83%) percent of the abusers had alcohol or drug problems; fiftythree (53%) percent came from alcoholic homes; thirty-one (31%) percent of the victims themselves had alcohol or drug problems; seventy (70%) percent of the victims identified their spouse or mate as having such problems; and forty-seven (47%) percent of the victims came from alcoholic homes.

2. In the business arena, a study of executives in the nation's five hundred largest banks, utilities and transportation, merchandising and life insurance companies in the United States revealed that only seven (7%) percent of the male executives were "teetotalers" or drank little compared to thirty-two (32%) percent of all men nationwide. Of the executives who drank (93%), seventeen (17%) percent worried that they were "doing too much drinking."

3. On a nationwide basis, alcohol has been involved in forty-one (41%) percent of all arrests and the use of alcohol was recorded in sixty-four (64%) percent of all murders, forty-one (41%) percent of assaults, thirty-four (34%) percent of forcible rapes and twenty-nine (29%) percent of all other sex crimes.

4. Alcohol and drug abuse are frequently part of the plight of the homeless.

5. Alcohol and drug abuse contribute substantially to the incidence of accidents and injuries in the workplace.

Alcohol and drug abuse is a problem which is pervasive in our society. It is a problem which frequently appears in the attorney's office, especially in the form of business or financial failure, divorce, arrest for various crimes, and child and spousal abuse.



The second common "discovery" of each of the subcommittees is that the attorney is in a unique position to identify and assist clients who have alcohol and drug problems, whether the problems are with themselves, a member of their families, or someone with whom they have a financial or personal relationship. The nature of the attorney-client relationship is such that the attorney is frequently able to gather information of a very personal nature and to avoid the alcoholic client's usual denial process, denial being one of the characteristic symptoms of alcoholism or drug addiction. Because the communication between attorney and clients is confidential and privileged, a client will frequently feel free to confide things that he or she would ordinarily deny. The client also recognizes that it is important that the lawyer know all of the facts in order to represent the client's legal interests. The client has sought the counsel of the attorney and, therefore, has not only recognized that he or she needs legal help but has chosen the attorney because of confidence in the attorney's ability to provide that legal assistance. Thus, as the client faces the attorney in the initial interview and works toward the resolution of the legal problem, the client relies on the advice and judgment of the attorney and respects the attorney's counsel.

Because of the nature of this relationship the lawyer is in a position not only to assist the client with the immediately pressing legal problem, but to help the client recognize the root cause of the problem, which frequently is related to alcohol and drug abuse. The Committee hopes that this report will help the attorney identify a client who has such a problem, but beyond that the Committee hopes that this report will give lawyers the confidence that, within the Canons of Ethics, they can speak to the client about the problem and direct the client to appropriate treatment and counseling.

Chapter 2 of this Report contains a summary of the major recommendations of the Committee as set forth in detail in the four subcommittee reports which comprise the other chapters of this Report.

The Committee is strongly of the view that a lawyer's best counsel to a client suffering from alcohol or drug abuse is to suggest an appropriate alcohol or drug treatment program. It is the hope of the Committee that those lawyers who familiarize themselves with this material will be more adept at recognizing and referring clients with such problems. We also hope that the report of the Ethical Issues Subcommittee will be especially helpful in assisting attorneys to understand the ethical considerations underlying our recommendations. Collectively, one step at a time, attorneys can help alleviate the overwhelming suffering and economic waste caused by alcoholism and drug addiction.

## **CHAPTER II**

### **SUMMARY OF RECOMMENDATIONS OF THE MASSACHUSETTS BAR ASSOCIATION/GOVERNOR'S COMMITTEE ON THE ALCOHOLIC CLIENT**

#### **I. Recommendations Applicable to the Judicial System**

1. The Probate and Family Courts should adopt and use mediation and intervention techniques to assist in the diagnosis and treatment of families and individuals who have an alcohol related problem. The Legislature should provide funding for such mediation services.

2. The Courts should be sensitive to alcohol and drug treatment referrals in c. 209A (family abuse prevention) cases.

3. Defendants should be advised at arraignment of the right to and availability of alcohol assessment and access to treatment if such defendant considers himself or herself to be an alcohol dependent person.

4. Judges should be encouraged to utilize, as an alternative criminal sentencing mode, drug and alcohol rehabilitation programs, particularly for relatively minor first and second offenses.

5. Appropriate material on the recognition of alcohol and drug problems and the availability of treatment resources should be prepared and seminars periodically scheduled for judges, district attorneys, lawyers, probation officers, parole personnel and all other participants in civil and criminal litigation. The offices of the Chief Justice of the Trial Courts, the Flaschner Judicial Institute, the Clerks' Association of the Massachusetts Judges Conference, the Criminal Justice Training Council, the Commissioner of Probation, the Department of Correction, the Parole Board and similar offices should be utilized to accomplish this recommendation.

6. When alcoholism is suspected, unsupervised probation is inappropriate. Accordingly, adequate resources should be made available for supervised probation.

#### **II. Recommendations for Attorneys and Law School Deans**

1. Lawyers are encouraged to help identify and motivate alcohol and drug abusing clients to seek treatment. The Committee strongly recommends that attorneys read the report of the Civil Issues Subcommittee (Chapter III) and the articles included with that report counseling attorneys on recommended procedures for dealing with the alcoholic client.

2. A defender's intake questionnaire included with the Criminal Issues Subcommittee report (Chapter IV) should be made generally available to assist attorneys in evaluating clients with alcohol or drug problems.

3. Attorneys should review the report of the Ethical Issues Subcommittee (Chapter V) setting forth the ethical considerations in counseling the alcoholic client.

4. The MBA through its Chemical Dependency Committee and other appropriate committees should provide training programs for lawyers to emphasize identification, referral and treatment of alcoholics. In addition, where appropriate, continuing legal education programs should consider these issues in developing and presenting program material.

5. Law school deans are encouraged to develop curricular materials, including textbook and legal ethics material and clinical legal training programs providing emphasis on the identification, assessment and referral of alcoholic clients. The Massachusetts Bar Foundation is encouraged to assist in a financial way any law school that wishes to develop such a program.

### III. Other Recommendations

1. Because it is essential to insure that persons suffering from alcoholism have adequate resources to prevent homelessness and to obtain treatment, persons seeking Social Security benefits who are alcoholic should be entitled to receive such benefits.

2. Employee assistance programs both in the private and public sectors should be encouraged in order to preserve jobs for workers which otherwise would be lost because of untreated alcoholism, to reduce industrial accidents and theft and to alleviate human suffering.

3. The Committee strongly supports the effort to remove from the road the driver who continues to drive after multiple convictions for operating under the influence, so as to reduce automobile accidents and deaths, with a corresponding reduction in insurance premiums.

4. The Department of Corrections is encouraged to create additional multiple offender alcoholic treatment centers.

5. The President of the Massachusetts Bar Association and the Governor and all educators are urged to articulate the importance of effective alcohol and drug education programs in the schools of the Commonwealth beginning at the kindergarten level.



## CHAPTER III

### REPORT OF THE CIVIL ISSUES SUBCOMMITTEE

The Subcommittee considered as its first task the identification of those areas of civil practice where an attorney is most likely to represent or deal with clients or others whose legal problems are impacted by alcohol abuse. Principally these areas are: domestic relations and family law; labor, employment and disability law; personal and business failure or bankruptcy; and tort practice, particularly automobile negligence litigation. The Subcommittee decided that its concerns should extend not only to the lawyer who represents a chemically dependent client, but also to the lawyer who represents or comes into contact with persons whose lives have been or are being substantially negatively impacted by others' use of drugs or alcohol.

Although this report and the materials attached refer to a person who has problems with alcohol, it is the intention of this Subcommittee to include not only alcohol, but all forms of chemical dependency; the use of the phrase "alcohol" is merely for convenience.

The lawyer, of all professionals, may be uniquely positioned to identify the role that alcohol abuse is playing in the client's life because of a particular crisis in the client's life which bring the client to the lawyer, for example: family disputes, including abusive situations, which are pointing to a separation or divorce; a business failure, employment and/or disability problem; or a motor vehicle accident or violation. The lawyer's dual role as advocate and counselor as well as the attorney-client privilege which allows confidential communications enable the attorney to be uniquely positioned to ascertain the root cause of the immediate problem and to avoid the denial process that an alcoholic frequently engages in with other professionals.

The first question which the Subcommittee addressed and which the lawyer has to address in his or her office is who are we talking about when we speak of the client who is chemically dependent or has an alcohol problem. There have been many tests or techniques to quantify and identify the chemically dependent person. One of the simplest is the so-called CAGE interview which consists of four questions:

- (1) Have you ever thought of Cutting down on your consumption of alcohol?
- (2) Do you find that you are Annoyed at others' criticism of your consumption of alcohol?
- (3) Do you ever feel Guilty about your consumption of alcohol?
- (4) Do you ever have an Eyeopener in the morning?

Studies have shown that if the answer to all four of those questions is positive, the person has an alcohol abuse problem. It is important to remember

that we are not talking about every client who is a so-called "social drinker", but at the same time we are not suggesting that the lawyer's inquiry should be limited to those whom society has traditionally recognized as "alcoholics" who are in progressive states of alcoholism. Rather, adopting the definition from the World Health Council, the lawyer should be aware of the role of alcohol in the life of a client when a significant area of the client's life appears to be negatively impacted by the consumption of alcohol.

The Subcommittee considered the attached articles by Attorney Richard Carrithers and Jon R. Weinberg, Ph.D., to be excellent outlines of the attorney's role with respect to identifying and counseling the alcoholic client and, by Mr. Carrithers' and Dr. Weinberg's permission, we have attached these articles to this report. The Subcommittee wishes to emphasize that after a lawyer has identified a client with an alcohol related problem, the lawyer can best serve the client by referring the client to an effective alcohol treatment program. There is a substantial distinction between the role of the attorney and the role of an alcohol counselor. This Subcommittee wishes to make lawyers in the Commonwealth more aware of the kinds of legal problems which frequently are related to alcohol abuse and to educate the attorney concerning techniques for communicating with his or her client in identifying the problem and referring the client to effective treatment.

Lawyers are trained to deal with immediate legal problems. Accordingly, it will require a change in their focus, as well as education in communications skills, for lawyers to be able to assist clients in treating excessive alcohol consumption, when such is the root cause of the legal problem. Education of the attorney in what resources are available is also an important aspect. The Subcommittee on Civil Issues considers it important that an attorney have available to him or her information about alcohol counseling and treatment programs. All treatment resources available in Massachusetts are identified in the publication "Alcohol and Drug Treatment: A Directory of Resources for Massachusetts Residents," which is reproduced as an appendix to the Committee's Final Report.

Finally, the Subcommittee wishes to make recommendations for development of new programs or resources that may be needed or improvements of existing ones and, although the following are far from an exhaustive list, they represent the thoughts of those who attended the meetings of the Subcommittee:

(1) The first recommendation is a result of a proposed change by the Social Security Administration in guidelines for determining disability based on alcoholism. The standards for adjudicating disability on the basis of alcoholism that are used by the Social Security Administration must be fair and must enable alcoholic applicants for benefits to receive those benefits before their alcoholism has reached an end stage where other body systems have been damaged. The purpose of this recommendation is to insure that people have the resources to obtain necessary treatment in a timely fashion before their lives are permanently damaged in some way by their alcoholism.

The effect of the withdrawal of benefits may also lead to homelessness from which it is extremely difficult for an alcoholic to recover.



(2) The Subcommittee encourages the Probate and Family Courts to adopt and use mediation and intervention techniques and modalities to assist in the diagnosis and treatment of families which have an alcohol related problem and we recommend to the legislature the funding of such mediation services. It is the Subcommittee's belief that if there is an increasing referral to effective alcoholism treatment there should be a substantial reduction in domestic violence, child abuse and even divorce. We further recommend that the Department of Social Services and other similarly situated agencies of the Commonwealth emphasize diagnostic and treatment modalities to deal with alcoholism when a family is impacted by child and sexual abuse or domestic violence.

(3) The Subcommittee strongly supports the creation of well developed employee assistance programs for corporate clients and for municipal and state governmental bodies. We believe that effective employee assistance programs can help in preserving jobs for workers which otherwise might be lost because of their alcoholism and in reducing many of the employment related problems such as accidents and thefts. The Subcommittee considers of particular value the attached chart entitled "How a Troubled Employee Behaves." The creation of employee assistance programs will aid in saving the jobs of many alcoholic employees by directing such employees to treatment at an earlier stage in their illness.

(4) The Subcommittee strongly recommends and encourages the continued emphasis on removal of the alcoholic driver from the road as we believe that such removals can lead not only to a significant reduction in automobile accidents and injuries, but also to a corresponding decrease in automobile insurance premiums.

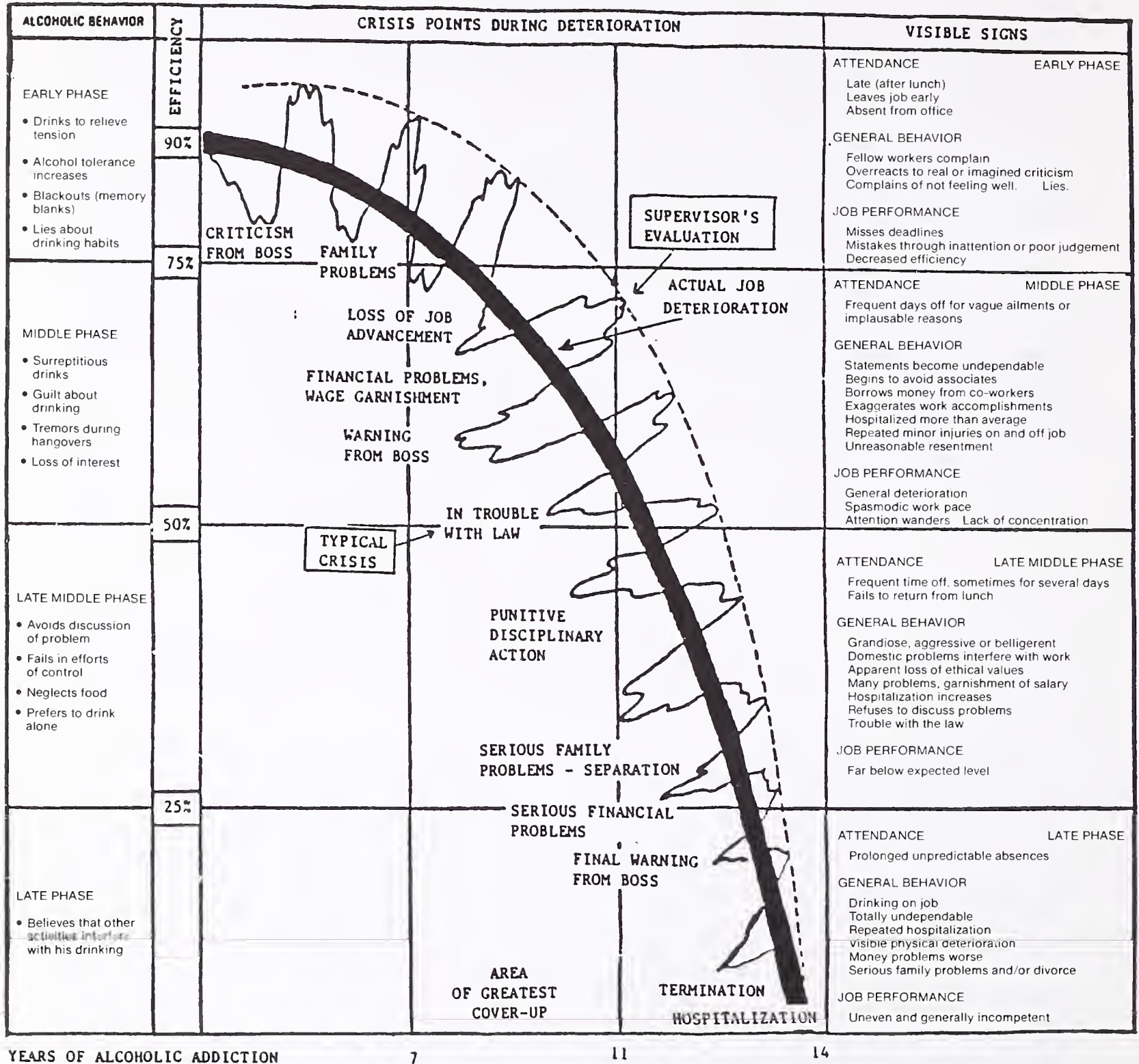
(5) The Subcommittee recommends to the courts an increased awareness of the role that alcohol plays in noncriminal cases such as spousal abuse and additional training of court personnel who deal with these situations. According to the 1984 Annual Report of the Massachusetts Trial Court, 7% of the District Court Department's noncriminal caseload comprised spousal abuse cases with an 11% increase in case entries in 1984 to 16,631 cases. In addition, the Probate and Family Court Department recorded 2,269 c. 209A (family member abuse prevention) cases and although statistics are not available for c. 209A entries for the Boston Municipal Court and Superior Court Department it would be safe to say that the total system sees well in excess of 20,000 new abuse cases each year. With the exception of the Superior Court and Juvenile Court judiciary, all judges see abuse petitions on a daily basis. Alcoholism in the family plays a part in the majority of cases. These cases are noncriminal in nature as the criminal process is not triggered unless or until there is a claim of violation of a court order.

As counsel is seldom involved, it is incumbent on the courts to be sensitized to the issue of alcohol abuse and treatment. In most courts, the 209A petitioner is screened by the probation department or the clerk-magistrate's department. Ultimately the Chief Justice of each department is responsible for the training of judges and clerk-magistrates. The Commissioner of Probation is responsible for the training of probation officers. Annual and semianual education programs of each department of the Trial Court are good oppor-

tunities for reaching judges and clerk-magistrates. In addition, the Franklin N. Flaschner Judicial Institute, which is an independent Division of the Massachusetts Bar Foundation, would more than likely be interested in developing a program for trial judges in this area.

Finally, the Subcommittee would like to emphasize that what we are recommending for effective attorney/client relations in dealing with the alcoholic or with clients who have suffered as a result of alcohol abuse is not meant to be in the form of ironclad rules; rather what we are offering are suggestions which we hope the lawyer will find helpful in more effectively representing his or her clients. We believe that it is always better for an alcoholic client to be counseled into effective treatment for alcoholism than to continue drinking and to have his or her drinking problem ignored by those people from whom he or she is seeking professional guidance. It is a characteristic of the alcoholic to deny his or her alcoholism. Those who counsel alcoholics are strongly urged not to cooperate in this diseased denial process.

## HOW A TROUBLED EMPLOYEE BEHAVES



YEARS OF ALCOHOLIC ADDICTION

7

11

14

Bay Colony Health Services  
a division of

**Mediplex**  
THE ART OF HEALING

## **HELPING THE CLIENT WITH ALCOHOL-RELATED PROBLEMS**



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**HELPING THE CLIENT WITH ALCOHOL-RELATED PROBLEMS**

**by**

**Jon R. Weinberg, Ph.D.**

Legal difficulties are an extremely frequent consequence of pathological alcohol use. Approximately one-half of all arrests in this country are alcohol-related, although this figure will be reduced as more states abandon public drunkenness statutes. While no firm statistics can be cited relative to alcohol use as a factor in divorce, it is probably significant in at least one-third of marital dissolutions. Nearly one-half of all traffic fatalities and a high proportion of other auto crashes are alcohol-related. Many crimes of violence, especially within family and friend relationships, are alcohol-related. Burglary, forgery, and bad checks are also frequently contingent on drinking. None of these facts should seem suprising when one considers that an estimated nine million Americans are victims of alcoholism.

## **The attorney as advocate-counselor**

An attorney has a dual responsibility as both advocate and counselor when serving an alcoholic client. The alcoholic usually has a short-term goal only, e.g. beating a rap, avoiding an inebriety commitment, or getting a spouse back as fast as possible, but working simply as a legal advocate toward such goals may ultimately prove extremely harmful to the client and others. While each attorney will solve the dilemma in his individual fashion, the position of this paper is to encourage maximum consideration of the counselor role vis-a-vis the alcoholic client. In addition to the general moral issue of promoting the long-range welfare of client and society, several points specific to alcoholism are worth noting in support of this position.

First, alcoholism is a progressive disorder in most cases. The individual gets sicker with time and after many years his personal destruction may be complete. Intervention in this morbid process tends to be delayed until the late stages primarily because nearly everyone conveniently looks the other way, either saying "he's not that bad" (imagine if we took that position with cancer victims!) or "he would resent my intrusion into his business" (you bet he would!). The attorney, as trusted advisor without the personal involvement such as a spouse has, is in an excellent position to attempt intervention as an objective counselor.

Second, alcoholism is fully treatable with demonstrably good results. The frequent pessimism encountered is a result of the accurate observation that most alcoholics do not recover, but this tragedy is accounted for by the fact that most never get any treatment, others get inappropriate treatment or are untreated until the late stages, and some who are appropriately treated do not benefit. Of those alcoholics who receive proper specialized treatment prior to the late stages, the clear majority show substantial improvement or complete recovery, thus justifying the extra effort to attempt intervention in the face of initial resistance or resentment by the client.

Third, internal motivation is not relevant prior to treatment. There is a widespread notion that people must "be ready" for help, must "want" to change, must "volunteer" for treatment. In point of fact, virtually all people who end up getting any kind of professional services -- legal, medical, dental, psychological -- do so not on some simple volitional basis, but because they view the alternatives as worse. Thus people are not in hospitals, dentists' chairs, lawyers' and psychologists' offices because they love to be there and enjoy paying for the privilege, but because they perceive it as the lesser evil. Similarly, victims of alcoholism usually seek treatment not because they sincerely want help, but because some awesome consequences are hanging over their head, generally threat of divorce or jail for those ending up in a lawyer's office. Fortunately, such external motivation is very often converted during treatment to internal, which is of course necessary for long-term recovery. It is essential to remember that this conversion is the task of the treatment team and should not concern the attorney who is trying to counsel his "unmotivated" alcoholic client.

## What is alcoholism?

For simplicity, the attorney can identify alcoholism by watching for a small core of cardinal features. First, the behavior of the individual is notably different when he is even mildly intoxicated; second, the behavior when drinking is regarded as highly undesirable, (e.g. physical or verbal abuse) or has high probability potential (e.g. drunken driving) for harmful effects on others; and third, the undesirable behaviors resulting from drinking repeat themselves in spite of the person's genuine remorse and sincere intention not to repeat them. To condense even further, an alcoholic is one whose drinking directly produces continuing adverse consequences which he is unable to control (except by abstinence). It is equally important to note what alcoholism is not. It is not simply drinking too much, too often, or at the wrong time or place. It is not simply inability to hold a job, to go without drinking for periods of time, or to stop after one drink. It is definitely not lack of will power, moral fiber or emotional stability. It is simply a condition -- developed for as yet unknown reasons by 8% to 10% of people who drink -- which is defined by the results of drinking, by what happens when the person does drink.

## Assessment Strategies

While the attorney is generally in an advantageous position to gather complete and intimate information from his client, due to the confidentiality of the relationship and the advocacy position for which the attorney is retained, the alcoholic client poses a special problem. Unless he has been previously labeled or treated for alcoholism (and sometimes even then), he is most probably highly defensive and resistant to seeing himself as having a drinking problem, and especially to the specific label "alcoholic." Thus the attorney may need considerable skill to elicit the data on which to base a conclusion. Of paramount importance is communicating an atmosphere of complete non-judgmental acceptance, as one major component of the resistance and denial is the moral stigma of alcoholism still permeating our society. (The other major component is simply the threat to the person's drinking, which has often become his primary "raison d'etre".) It is usually most helpful in the assessment phase to avoid the word "alcoholic" in favor of "drinking problem" or "problems related to drinking."



Interview questions should direct themselves specifically to ascertaining behavioral consequences of drinking. The alcoholic will typically offer alibis or explanations, or go off on irrelevant tangents, but will seldom lie outright (except on unproductive queries related to "how much" or "how often"). The attorney will naturally begin with discussion of the legal consequences of drinking behavior as possibly reflected in his current difficulties, then review any prior legal problems, then move on to impairments, in family, social life, employment, and other key areas to the extent the client will tolerate. The focus of each question should be adverse consequences resulting exclusively or primarily from drinking. Thus a question such as "how many times have you been fired?" is only helpful if followed by "and which of those were related to drinking?" Similarly, the fact that the client frequently assaults people when drinking only becomes pertinent to the question of alcoholism if it is determined that he does not assault people when sober. The training and experience of most attorneys in interviewing clients and witnesses puts them in a highly advantageous position should they turn their attention to ascertaining alcoholism.

## **Counseling strategies: the parties in a divorce action**

### **The alcoholic spouse**

Having determined by careful assessment that the marital problems were in major part a direct consequence of his client's alcoholism, the attorney now faces a major problem: overcoming the alibis ("she would drive anyone to drink") and resistance ("sure I drink now and then, but I'm no alcoholic") sufficiently so that some impact may be made. The basic strategy is to calmly but ever so persistently correlate the marital conflicts with behavior following drinking. Rather than permitting the client to ramble on about his elaborate justifications for drinking, simply keep returning to the results of drinking, the current most visible one being impending divorce. If there appears to be any possibility at all of a reconciliation, emphasize the primacy of dealing with the drinking problem as an absolute prerequisite for salvaging the marriage, regardless of what other problems are alleged. If the divorce appears inevitable, stress the role of drinking as the principal cause of the tragedy, and point to other consequences, such as impairment of relationship with children, of efficiency on the job, of physical and psychological well-being, and inability to form successful future marital bonds.

The attorney's role is not to treat the alcoholic client, but simply to make a sincere effort to increase the probability that the problem will be recognized and dealt with in an appropriate way. One should accept the strong likelihood that the majority of such clients will not appear to benefit from these efforts, but keep in mind that seeds are being sown, that every person who has the courage to put reality squarely in front of the deluded alcoholic is contributing to his eventual crossing of the threshold into helpful action. For those clients who do become willing, however reluctantly or resentfully, to at least talk to someone else about his alcohol problem, the attorney should be prepared to make a prompt and effective referral. This means that a specialized alcoholism facility should be suggested rather than the more typical mental health or marriage counseling specialist. The great majority of professionals in the latter fields are not adequately trained to deal effectively with alcoholism. Appropriate help may be obtained in most areas by contacting the local Alcoholism Information and Referral Office. The client may subsequently be referred by the alcoholism counselor to lectures, to AA, to a qualified professional, or to a residential treatment facility according to the results of the evaluation.

### **The spouse of an alcoholic**

Attorneys are generally conscientious about examining the desirability of recommending marriage counseling prior to proceeding with divorce. When alcoholism has been the major factor, however, a somewhat different approach will prove more helpful. First it must be remembered that the client typically does not use the word alcoholic, which conjures up the image of a skid-row bum. She may not even emphasize drinking as a problem, as the noxious behavior may not be consciously correlated with alcohol use but rather considered as malevolence ("he's rotten") or mental derangement ("he must be



nuts"). Thus the wise attorney will gather from his client information pertinent to the assessment of alcoholism in the spouse, using the criteria described previously. For example, does he scream at her, stay out all night, or stay home from work only in conjunction with drinking, or is he equally irritating and abusive when sober? Once that it appears probable that alcoholism is the major problem, the client should be apprised of this opinion, even though she doggedly asserts that he has "other problems" (of course, who doesn't?). If the client at least concedes that things would be a lot better -- though hardly perfect -- at home if the spouse did not drink (thus confirming the presence of alcoholism), the lawyer may go on to suggest several options.

The first option, and often most desirable, is to work with the attorney for the alcoholic spouse so that pressure may be applied by all concerned parties to move the alcoholic to seek specialized help as outlined in the preceding section. It is important to remember that such externally induced motivation is the typical beginning of the recovery process, so that his sincerity is not an issue at this stage. The client should be informed that success in getting the alcoholic to commence a recovery program should not lead to such a burst of optimism that the legal action is dropped and reconciliation is made immediate. Generally it is preferable for the couple to continue separated for several months to permit the rewards of sobriety to produce some internal motivation which is no longer contingent upon threat of divorce; also important is for the client to witness successful sobriety in her spouse and begin to consider how best to approach the remaining marital problems without the stress on both parties of living together.

A second option to be considered, especially when the first option is either rejected or is unsuccessful, is for the client to seek help for herself, with primary emphasis on learning about alcoholism and how one can learn to live with an alcoholic and still retain a reasonable degree of stability. This option is likely to appeal most to those who show extreme ambivalence about divorce and have a tendency to begin legal action but somehow fail to follow through as the final hearing approaches ("I can't live with him or without him"). Such a client should be referred to the Alcoholism Information and Referral Office, and is likely to end up getting supportive help from Al-Anon (groups similar to AA, but for the spouse of the alcoholic) and/or a professional counselor.

The third option, to be particularly commended to those whose alcoholic spouse has been unsuccessfully treated several times, in the late stages, or otherwise demonstrates a poor prognosis, is simply to move ahead with the divorce. This option may also be desirable when the client (and often her family) has lost all positive feelings for the alcoholic and may barely be able to function herself because of the accumulation of intense stress. The lawyers may then be supportive of a decision to abandon an extremely sick person without bearing a burden of guilt, on the grounds that survival of the remaining family members is a legitimate priority. Furthermore, some alcoholics finally turn the corner only after experiencing the harsh reality of losing their family.

## **Counseling strategies: the alcoholic in a criminal action**

Criminal offenses directly generated by behavior changes consequent to alcoholism require sensitive handling by the attorney. Dealing with the problem in such a way as to result in either a simple finding of innocence or guilt in the traditional legal sense is unlikely to result in lasting benefits. Whether the client is freed or punished, recidivism is almost inevitable if the alcoholism is not successfully treated. In many cases, such as drunk driving, recidivism may mean tragedy. While the defense attorney is obviously but one of several influences in determining the outcome of the case, he may be able to initiate a plan with the court and his client which focuses on rehabilitation through treatment, either in addition to, or in lieu of, punishment. The plan can usually be more sensibly formulated if consultation is sought from specialists, such as an alcoholism counselor, or perhaps a reliable AA person. In some cases, part or all of a sentence may be suspended on condition of scrupulously following the plan. In other cases, where there is no judicial finding of guilt, the lawyer may simply wish to strongly encourage the client to seek appropriate help, even though he is anything but appreciative of such advice. A critical point to be remembered is that all these suggestions are contingent upon correct assessment of the basic problem as alcoholism, meaning that the criminal behavior occurs if, and only if, the person has been drinking -- otherwise, one will mistakenly reinforce the common tendency for non-alcoholic offenders to offer drinking as an alibi, hoping to do soft time in treatment.

## **Counseling strategies: the alcoholic colleague**

Alcoholism, being as democratic an illness as any other, claims lawyers as victims as often as plumbers or mechanics. The typical way of dealing with a colleague's alcoholism in the legal or any other profession is to carefully avoid the subject when talking to the alcoholic ("he would take offense if we mentioned it") while gossiping freely behind his back ("isn't it a shame about poor Charlie's drinking -- somebody should do something"). Ultimately, when the alcoholic has been fired from the firm, has lost his practice, or has been caught for his own desperate unethical or criminal acts, or perhaps has died prematurely, everyone will feel a touch of guilt for not having helped to avert the tragedy -- after all, "he was basically a fine person."

There is a way to help the many fine people who fall victim to alcoholism before careers are ruined or lives and families destroyed. Every colleague, friend, or relative who cares about the alcoholic may make a contribution by confronting him at every opportunity with two basic messages: first, drinking is interfering with your functioning (specific facts must be given, e.g. you didn't show up in court on time Monday; you did not have the contract drawn up properly); second, you can be helped with your drinking problem as have so many others (specific resources should be offered, e.g. a treatment center, an attorney in AA). Much greater effectiveness is demonstrable when two or more people make this confrontation jointly. The greatest effectiveness will occur if a coercive element can be added, e.g. take relevant action about your drinking problem or else you are on probation with the



firm, with discharge the next step. While the confrontation approach suggested will by no means always be successful, the probability of the alcoholic taking positive action is greatly enhanced compared to avoiding the issue, or worse, covering up for him -- the latter "help" is tragically harmful.

### **The summation**

The material presented herein has intentionally neglected the role of attorney as legal advocate in favor of emphasis on client counseling. This emphasis should not be construed as suggesting that the traditional role be diminished, but rather that the additional role be augmented, because of the unusual nature of alcoholism as an illness which often results in some variety of legal involvement. Such an emphasis unquestionably means expending additional time and energy in assessment, persuasion, and referral, and the lawyer's motivation must come from his own value priorities. It is recognized that clients suffering from alcoholism (a characteristic symptom of which is denial of an alcohol problem), may not only be unappreciative of the extra effort involved in the counseling strategies suggested, but may angrily insist that the attorney mind his own business and stick to legal issues instead of playing doctor. One should be accepting of such apparent failures, realizing that many are simply unable to see reality at that point, and some who do not appear to listen will benefit later as future adverse consequences of drinking fertilize the seeds that have been sown. There is, of course, a tremendous reward when the strategies pay off in a life that is completely turned around by successful recovery.

### **Acknowledgement**

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**THE ALCOHOLIC CLIENT --**  
**IDENTIFICATION AND EFFECTIVE REFERRAL FOR DIAGNOSIS  
AND TREATMENT**

by

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**THE ALCOHOLIC CLIENT--**  
**IDENTIFICATION AND EFFECTIVE REFERRAL FOR DIAGNOSIS**  
**AND TREATMENT**

**I. INTRODUCTION**

The practicing attorney with the proper knowledge and interview techniques is in an enviable and unique position to be able to identify the alcoholic client, and motivate that client toward effective treatment--all without the loss of the client or his respect.

**II. WHY IS THE ATTORNEY SO IMPORTANT IN THE REFERRAL PROCESS FOR THE DIAGNOSIS AND TREATMENT OF THE ALCOHOLIC CLIENT?**

**A. The Attorney is in a unique position to identify the alcoholic.**

**1. People with alcohol problems usually have legal problems.**

Because the alcoholic in the last half of the twentieth century must function in a highly complex and demanding society, he or she, because of the unique disability that the illness imposes, often faces numerous and repeated legal problems.

A classic example, of course, is the traffic-related offense, most particularly driving while intoxicated, or physical control offense. Others would include alcohol-related criminal activities (theft, embezzlement, sex crimes, assault and the like). The alcoholic often finds his marriage under severe strain or breaking up and often finds himself in a position of either personal financial failure or a business-related failure.

All of these problems usually come to the attention of a practicing attorney and many times (not always) these problems are alcohol-related and are caused in part by the fact that a particular client suffers from the illness of alcoholism.

Not all traffic cases, criminal cases, dissolutions or business or financial failures are alcohol-related, and most may not be, but the alert attorney will not ignore the possibility that alcoholism may be a factor in many cases that he handles on a daily and routine basis.

**2. The potential alcoholic comes to and seeks out the attorney.**

The task of identification of the alcoholic is easier because in the attorney's case, the alcoholic is seeking out the attorney for assistance and the attorney is not compelled (as a relative, spouse or friend would be) to seek out and deal with the alcoholic.

**3. The attorney is free to ask a lot of detailed and even personal questions about the client, the client's background and the facts and circumstances surrounding a particular problem.**

Because legal solutions are often complex and detailed, the attorney is expected to ask a lot of questions about the client, the client's background, the



client's personal life and the facts and circumstances surrounding the problem under discussion. The client will generally discuss these questions freely and openly because most clients expect that the attorney (or a good attorney at least) will ask or want to know about these facts. In addition, the attorney is bound to ask enough questions to elicit sufficient facts for him to be able to solve or deal with a given problem effectively.

Therefore, as a discussion with the client progresses and as factual patterns emerge, the astute attorney can begin to recognize whether or not alcohol or alcohol-related problems play a part in a particular case.

4. The attorney-client relationship is private and confidential.

Because the relationship is confidential and private, the client will often confide facts and circumstances to the attorney that a spouse, best friend or relative may never learn. These facts may give additional or added insight into the nature for potential alcohol-related problems.

B. The attorney has special status and leverage.

Because the attorney has special status and leverage in this particular attorney-client relationship, everything that he says and does has heightened importance and significance, and in some cases (from the client's view) almost oracular impact. This is so for a variety of reasons:

1. The attorney has a special position of knowledge and learning in the community.

We have all heard that attorneys have been under fire recently for excesses, abuses and incompetence, but most often (in my opinion) by people who haven't had occasion to need one.

The fact is that the attorney, by education, by training, and by experience, is a unique member of society and is in a unique position to help a wide variety of people with a wide variety of a complex and baffling problems. Most individuals, laymen or otherwise, understand this and implicitly believe in this proposition.

2. The client has a real need to have his particular legal problems solved.

The client is going to pay particular attention to the attorney's thoughts, comments and actions because the client has a real need to have these thoughts, comments and actions be effective for the solution of the client's particular problem. The client wouldn't be sitting in an expensive office paying a lot of money if he did not have this real need and desire to have the problem disposed of.

3. The client seeks out the attorney--not vice versa.

Remember, you didn't call your client--he called you. The client is much more afraid that you will reject him rather than that he will not select you as

his attorney. He came to you for a variety of reasons (he knew you from before, he was referred to you by a friend, or had some other reason to seek out your advice). Because the client sought you out, you have more leverage and control over the interview and the interview situation that you would if you were a spouse, relative, or friend.

4. As an attorney you can explain the painful consequences and disasters that attend failure to remedy his particular problem (or failure to change a particular pattern of behavior).

If the problem has not been solved effectively, oftentimes severe financial or even physical penalties await the client.

As an example, consider that the driving while intoxicated statute penalty (especially after January 1, 1980) is jail, plus a fine, plus loss of driving privilege, plus increased and added cost for automobile insurance, plus court costs and personal inconvenience. Additional or added penalties come from the potential application of the habitual traffic offender law (loss of driving privilege for five years) and the accumulated or added penalties for multiple violations (additional periods of license suspension or outright revocation, additional periods of jail time, and additional fines).

Thus, when you are in an interview situation, remember that you have a lot of power and control over the situation and if you use this power and control wisely, with sensitivity and with compassion, you will be in a position to do a lot of good for your client--especially if your client has or gives you an indication that he or she suffers from alcoholism.

### III. HOW DOES THE ATTORNEY IDENTIFY THE ALCOHOLIC CLIENT?

A. The attorney is not a diagnostician by training and is generally not trained in the field of alcoholism, but there are obvious clues:

1. High breathalyzer.

A traffic citation involving alcohol with a high breathalyzer reading (.18 or higher) especially when the client is functioning well or after an extended lapse from the time that drinking ended to the time the breathalyzer was taken is an indication of a high or increased tolerance for alcohol-- often a primary symptom of early or middle stage alcoholism.

2. Client attending office meetings, court appearances, or other functions after drinking.

Clients who drink at inappropriate times (drinking before a court appearance is highly inappropriate) are often manifesting their extreme dependence on alcohol and the alert attorney will note and act on this fact.

3. Drinking during morning or during business hours.

This is similar to but not particularly the same as the preceding situation. A client who socially will want to drink when other people are having coffee or want to drink in lieu of lunch or who drinks at other inappropriate times is evidencing the dependency referred to above.



4. Drinking substantial amounts of alcohol and drinking often.

The client who consumes a substantial amount of alcohol (for example, six plus beers a day) and does this on a daily basis is clearly evidencing the dependency upon alcohol that shows early or middle stage alcoholism.

5. Being defensive about drinking.

The client who is defensive or hostile when the subject of his drinking is broached is obviously concerned and sensitive about his drinking and is showing you, the attorney, that his drinking is a problem for him.

6. Memory loss (blackouts).

Often you will be confronted with a client who cannot remember or recall a particular event, especially after drinking has been involved. His recall may be sketchy or nonexistent. This may be indicative that the client has suffered from or is experiencing the symptom of alcoholism which is called a blackout--where the client still continues to function but has no memory or recollection of that event.

7. Increased or decreased tolerance.

The client who indicates that he is not able to drink as much as he used to or is able to drink much more than he used to evidences a physical reaction to alcohol that is common to many alcoholics.

8. Legal problems in combination.

One snowflake does not make a snowstorm but if a client comes to you with a marital problem and then consults you on a DWI and then wants you to put him through bankruptcy, you might do some judicious checking to find out why, all of a sudden, this individual has a lot of legal problems. Another example would be two or more DWIs in a short period of time, especially after the person has had some sort of alcohol information course in between. No one wants legal problems and if one still encounters them then they must be happening for some reason. Perhaps the explanation may lie elsewhere than alcohol, but perhaps the explanation may lie in alcohol use and abuse.

9. Past attempts to stop drinking.

Any person with a drinking problem will usually, at some point or another, attempt to stop drinking. Because of the dependency most alcoholics are not able to stop on their own and they do resume drinking with the attendant negative fallout. An admission by the client that he has attempted to stop drinking but has resumed again is a strong indication of a drinking problem as perceived by the client.

10. Client's own statements about drinking.

Many times the client in the interview situation will state that he believes that he is drinking too much and that it affected his marriage, job, reason for

committing the criminal act, monetary situation, etc. This is the easier situation to deal with because the attorney can logically question the client further and oftentimes eliminate a lot of the difficulty in the interview and refer the client to effective treatment without any further delay. The point is, listen to your client; he may be telling you much more than you have been hearing.

B. Know your own limitations--you are a lawyer not a trained alcohol counselor or diagnostician.

Exact diagnosis (for the untrained) is difficult because:

1. Alcoholism develops in stages.

Alcoholism has marked stages of development and in the early or initial stages of development it is difficult for the untrained to differentiate between heavy social drinking and early stage alcoholism. This will be important when the attorney begins to confront a client who may have a drinking problem.

2. A major symptom of alcoholism is denial.

Most alcoholics at one time or another vigorously deny that they have a drinking problem and attempt by numerous and devious means to cover up the problem. This is especially evident in the early and middle stages of the illness. Again, this aspect of the illness will have significance for the attorney in the confrontation stage of the interview. (See below.)

3. Alcoholics tend to rationalize drinking.

Because the alcoholic is concerned with the amount and quantity of alcohol consumed, he will spend a lot of time rationalizing this drinking in an attempt to justify or defend it. Again, this has significance for the attorney in the confrontation phases of the interview.

C. How does the attorney live with his limitations?

The answer is to refer the client to an expert for diagnosis and treatment.

Advantages for doing this are:

1. The referral gives the attorney credibility.

The referral to an expert for diagnosis tends to give the attorney credibility because a second opinion can be provided. In theory it is a first opinion because the attorney does not "diagnose;" but even when the attorney is reasonably certain that the client is alcoholic, a diagnosis by a second party who is unbiased will lend great credibility to the attorney's efforts.

2. Referral gets the attorney out of the confrontation mode.

Once the client is referred for evaluation and/or treatment, the client can expend his energy (if he is alcoholic rationalizing and being defensive with a trained expert) and the attorney can get back to being the lawyer and working on strictly legal problems.

3. The referral process puts the client directly in contact with potential treatment.

When the client is referred to an expert for diagnosis and/or treatment the client then can be confronted immediately with the prospect of deciding for effective treatment and rehabilitation. Clients are not treated in law offices and decisions for treatment are usually not made there. Individuals who enjoy fly fishing for Arctic Grayling do not fish for them in the Sahara Desert.

IV. WHAT DOES THE ATTORNEY DO WHEN HE BELIEVES HE MIGHT HAVE SOMEONE WITH A DRINKING PROBLEM?

A. Develop techniques that lead to having the client examined and diagnosed by a competent expert in the field of alcoholism.

B. Use all means at the attorney's disposal to get the client into an effective alcohol treatment program.

V. HOW DOES THE ATTORNEY MOTIVATE THE CLIENT TO SUBMIT TO DIAGNOSIS AND/OR TREATMENT?

A. Find out what group or entity within reasonable reach of your client will diagnose and/or treat your client effectively.

1. Have your law office implement the program outlined at the conclusion of this article.

The first step is to check the box marked "implement" on the attached materials and have your secretary initiate the needed correspondence to give you the information which you will require.

2. Effective utilization of the information supplied.

a. Select one of the more competent treatment centers.

Based on the information supplied you will be able to select one or more competent treatment centers which have a good record for diagnosis, treatment and recovery. The selection process may be subjective and may depend on the particular attorney acting with the advice of the local representative from the local community alcoholism center.

b. Meet with the treatment center director or key staff person.

It is important to establish a first-name familiarity with the director of treatment or key staff member at the treatment center.



The attorney should set up a meeting with this person to: discuss the availability of diagnostic services and at what cost; discuss the applicability and availability of health insurance; discuss the willingness and ability to do or accept a time payment plan for treatment; discuss the plan of treatment itself and the method of treatment (vitamin, diet, aversion therapy) and ask about the recovery rates (to find out first hand how effective the particular program under consideration actually is).

c. First name bases allow the attorney quick and impressive results.

Once the attorney has established a first name basis, then he can call any time and refer anyone for a quick and efficient evaluation on a personal basis. This gives the attorney additional credibility and invokes additional confidence so that you are "looking good" and helpful in the client's eyes.

### B. Differentiate between education and alcohol treatment.

The attorney should know that alcohol education, such as commonly provided by alcohol information schools run or sponsored by local community alcoholism centers, is not treatment. Even though there may be a resident director and staff which can and do provide valuable information and education services, these centers are not designed for treatment but are designed to educate a person and/or motivate toward treatment.

While I cannot speak for every community alcoholism center, these centers are usually staffed by sincere and often knowledgeable people who try to do as much as they can for a party, but sometimes these persons exceed their areas of competence and drift into the "treatment" phase through "counseling" rather than referring the client or patient for effective treatment.

This is justified on the basis that some treatment or counseling is better than none but the attorney should be aware that only effective treatment gives the best possibility for lasting recovery and sobriety.

### C. Outpatient counseling or "treatment" is generally not as effective as inpatient residential treatment.

Closely associated with counseling and education are several outpatient programs designed to "treat" clients. Again, I could not express a personal opinion on the effectiveness or desirability of outpatient care, but most experts generally recognize that inpatient residential treatment is the best way to deal with and treat the illness of alcoholism.

Many clients will attempt (if they see that treatment is the only alternative) to opt for outpatient treatment (on the grounds that they will lose their jobs, etc.) but a firm commitment to inpatient treatment is often the best advice a client can be given. Each attorney should make this determination for himself, but a decision should be made.



D. A word about Alcoholics Anonymous (AA).

AA (or "the program" as it is often called) is a widely known group consisting of numerous individuals (numbering at least one million) who are sincerely dedicated to the idea of staying sober. Many people actually find and obtain sobriety at or through AA.

However, the attorney should recognize that even AA is not treatment. Experts believe that AA is most effective and beneficial after an alcoholic has been effectively treated for this illness of alcoholism, because AA does offer such an excellent program of personal development along with a means of supportive sobriety retention.

A referral of a client merely to AA (or a spouse, parent of child to Al Anon) is, in my opinion, to be avoided if there exists the alternative of referral for effective diagnosis and treatment. Reputable treatment facilities do encourage and recommend AA involvement and participation, but only after the effective treatment phase of the recovery process has begun.

E. Boldly address the subject of alcoholism and discuss it with the client, (assuming that the attorney believes that the client may have a drinking problem).

1. Attorney has obligation to solve problem.

Begin this segment of the interview by stating to the client that you have an obligation to solve his legal problem and that you can do it. The client will be relieved and will be psychologically turning to you and be willing to take your advice.

2. Reiterate that your obligation is to solve his legal problem not enrich yourself at his expense.

Clients will always be glad to hear attorneys reiterate this proposition. You will say this to the client because it is true and because if the client has alcohol related problems, or is in the "fast lane," (see below) he will know what you mean later on in the interview.

3. State that you want to discuss the illness of alcoholism and that you discuss the illness with all clients regardless.

This is the beginning introduction that you will make to the client about the illness of alcoholism and the beginning of the focus on the client's situation. If you indicate to the client that you do this in every interview regardless, this reduces the defensive reaction of the client, and gives you justification for proceeding. The client will understand that it is just a normal and routine measure and that you do this all the time.

4. The disease of alcoholism.

a. Describe the disease of alcoholism (simply drinking alcohol in a manner that the client is harmed socially, economically, or bodily).

b. State that alcoholism is a disease; that it is not a "sin," it is not a "moral weakness," and it is not a "mental illness." State that it is a treatable physiological illness. State that people who are effectively treated do get well.

c. State that alcoholism has two major characteristics:

(1) It is always progressive. State that there are no exceptions. This is important because it will be difficult to differentiate between the early stage of alcoholism and heavy social drinking. Only experts can do that. This difficulty of differentiation makes it easy for the early stage alcoholic to cover up. However, if the alcoholic is led to understand that his illness is always progressive, he will be motivated to do something about it before it gets worse and he probably already knows this anyway.

(2) It is always fatal. Again, state that there are no exceptions. Unless treated, the illness always results in the death of the victim.

5. Why bring it up? (The constructive use of "percentages")

You can state to your client that one out of ten drinkers is an alcoholic. You can state that out of the general population of people charged with DWIs (or who suffer bankruptcies, or other alcohol-related offenses), the likelihood is that the percentage of people who are alcoholic is higher, often four or five out of ten. You further state that the likelihood that anyone who is in the client's position of being an alcoholic is great, and this is how you justify proceeding on with the subject. You can emphasize that you know nothing about the client personally, and that you have no idea whether or not the client is an alcoholic, but only that the likelihood is substantial that the client may be an alcoholic.

6. Admit reluctance to bring up the subject.

You can frankly state to the client that you are reluctant to bring up the subject of alcoholism, because you know that denial (and minimizing) are primary symptoms of the illness so that the alcoholic will or may feel the desire to deny that there is a problem and correspondingly argue with you or debate with you about the issue. State that you do not wish to fight with anyone and that you do not diagnose or treat but only desire to deal with the subject.

Explain to the client why alcoholics deny the illness.

a. Alcoholics are addicted to the drug alcohol and want to protect the source of supply. (Note that once an alcoholic admits the problem he is denied his source of supply if he is to recover.)



- b. Alcoholics are influenced by myths that exist about alcoholism.

Many alcoholics are confused as to the true meaning of alcoholism. They are concerned that alcoholics may be "sinners," may be "mentally ill," may not be "macho," may lose friends if they cannot drink, etc.

7. State to the client that the symptom of denial evidenced by an alcoholic forces the attorney to appear to be arguing.

Stress that you (the attorney) only want to help and that most attorneys would never even dare bringing up the subject of alcoholism for fear of alienating a client, but state that you (the attorney) are a total stranger and that you have no reason to tell the client anything except for the fact that it is the truth. State further that you have no reason to tell the client anything or do anything with respect to the client unless it is to help the client, and that the client can walk out or leave if he does not like the subject matter but that you know that the client will not because he appreciates candor and honesty.

8. Broken leg--fast lane of the freeway analogy.

This analogy is best explained by having the client imagine that he has been hit by a car, that he has a broken leg, and that he is lying in the fast or inside lane of the northbound Interstate 5. The facts are that the client somehow manages to contact you and that you are the best orthopedic surgeon in the United States. You are free at the time and you take your medical kit and go to the scene. You see that you can fix the leg, even though it is a fairly serious break (compound fracture) and as you reach under the client to move him out of the fast lane over to the center divider strip so you can begin treatment, the client reaches into his shirt and pulls out a .357 Magnum and jams it up your left nostril and says, "You blankety-blank--I called a doctor to get my leg fixed and I want you to fix my blankety-blank leg. If I wanted to be moved I would have called Allied Van Lines. You are just a doctor so fix the leg and leave me alone." Assume that you are intimidated by the .357 Magnum and you fix the leg (brilliantly, I might add) and leave. What happens next? Obviously you are going to get another phone call, and if the client isn't dead you are going to be repairing more broken bones and you will be continually providing services (and sending a bill, too) to this particular client.

9. The point of the story.

The point of the story is this: If the client is an alcoholic he will continue to drink alcoholically unless treated. By continuing to drink alcoholically the client will probably continue to have new and even more serious legal problems. The attorney can always try to assist the client with the new and even more serious legal problems, but the client will incur unnecessary and extra expense in solving these new and more serious problems. All this is needless and can be eliminated if the client will just allow himself to be moved out of the "fast lane" of Interstate 5 and get effective alcoholism treatment.

At this point in the interview it would be appropriate to ask the client: Do you think that you may be in the "fast lane?" Would you like to find out?

You should reiterate that you are only an attorney and the you do not diagnose or treat alcoholics. State that you do know someone (or some entity) that does diagnose and does treat and that is excellent in this particular field. You should then give the client the name of the entity and the party.

You should ask the client if he would be willing to talk with this individual or entity for an evaluation interview to see if the client is, in fact, in the "fast lane." State that if the client is, in fact, in the "fast lane" that you can help the client arrange for effective treatment so that the client will recover, get well, and so that you, the attorney, can concentrate fully on the legal problem at hand not have to worry about continuing and recurring additional and more serious legal problems.

10. Caveat--always be careful to nurture the belief that you are an honest and competent attorney and interested truly in the client.

Avoid appearing as a "do-gooder," and alcohol "nut," or a "special interest" lobbyist for some alcohol treatment center. In order to dispel any of the particular aspersions, you may have to state that you yourself drink and enjoy it (or you know and respect people who do) or that any drinking that doesn't hurt you is not objectionable, or that drinking isn't a sin, or that you are not a preacher, or that you do not have any financial interest in the treatment center to which the client is going to be referred.

Again, this is a subjective area, but clients do not like to be "preached at" and the attorney should take great care to avoid this posture.

VI. HOW FAR CAN THE ATTORNEY GO?

My opinion: If you have actually had an effective confrontation with the client about his drinking, and if the client has been referred for effective evaluation and/or treatment, and has refused one or both, then you have done all you can do at that time.

VII. CAN YOU DO ANYTHING IF THE CLIENT REFUSES EVALUATION OR IF DIAGNOSED AS AN ALCOHOLIC REFUSES TREATMENT?

The answer is, yes, you have several choices:

A. Fire the client.

If you feel strongly that the client is an alcoholic, you can fire him on the grounds that he is wasting his money with you (since he will not follow your advice) and in good conscience you cannot continue to take his money because you know that the services you are providing (or will provide in the future) would be useless and unnecessary if the client would just seek and obtain effective recovery.



B. You can set up a client for possible future help.

The best way to do this is to recognize that if the client is an alcoholic, he will probably be having more and serious legal problems and may consult you on them. You can point out to the client that this is likely to occur (such as the client will obtain another DWI, the client will continue to suffer marital problems, the client will continue to drink, or whatever else the criterion is). It will be possible (often) to extract an acknowledgment from the client that if he does find himself suffering from these new or additional problems, or that he cannot control his drinking, then obviously he is an alcoholic (even though he presently denies it), and that he will then be willing to get effective treatment at that time.

Classic example I: "I can stop drinking on my own and I have not had a drink for two months. But, I agree that if I cannot stop drinking or maintain my sobriety on my own then I must be sicker than I thought (or an alcoholic) and I will come back and talk to you and be willing to go into residential treatment at that time."

Classic example II: Substitute, "I will get no more DWIs, etc.," for, "I can stop drinking on my own."

VIII. PARTING SHOT

Remember, not all confrontations are going to result in a client going for and getting effective help. Success will often come in streaks and patience is often really called for. You may have to wait the client out and if the client has trust and confidence in your honesty, integrity and ability, he will seek you out again when his illness progresses and when he needs to turn to someone for help.

If you are there, with the knowledge, ability, and sensitivity to be able to meet his needs and a firmness to be able to direct him to the effective help and treatment that he needs, you will have fulfilled the highest goals of your profession and you will have served your fellow human beings with distinction.

CHAPTER IV

REPORT OF THE SUBCOMMITTEE ON  
CRIMINAL ISSUES

The Criminal Issues Subcommittee for its report makes the following recommendations:

1. That the Committee adopt a defenders intake questionnaire for general distribution in the District Courts of the Commonwealth and printed at the expense of the Commonwealth in the form substantially as attached hereto as Exhibit "A". The blank space on the back page is designed to afford local courts to identify appropriate resource services within

the jurisdiction of the court in order to enhance the utility of the form. It is our recommendation that the form be generally available in each District Court without charge to every member of the bar.

2. We recommend that each District Court and Superior Court at arraignment advise each defendant that if he or she believes that he or she is an alcohol dependent person that such defendant has the right to assessment and access to treatment by acknowledgement to the court through counsel or in writing within an appropriate period of time, probably the pre-trial conference date at the latest.
3. We recommend that General Laws c. 276 section 87 be the focus of an educational emphasis as a vehicle to encourage judges sitting in criminal sessions, whether in the District or Superior Court, to provide alternative treatment and rehabilitation programs as a probationary vehicle, particularly for relatively minor first or second offenses.
4. We recommend that the several District Courts include the alcohol dependency advisory on the printed notice cards given to every defendant in order to reinforce access to appropriate treatment and therapy beyond the oral in-court warning. We have attached as Exhibit "B" sample language for such.
5. We recommend the development of a revised probation officers intake form by the addition of several questions directed to alcohol dependency generally in the form as attached hereto as Exhibit "C". We also suggest that defendant's counsel be generally familiar with the Alcohol/Drug Use Inquiry attached hereto as Exhibit "D".
6. We recommend that the Department of Corrections be commended and publicly supported for creation of multiple offender alcoholic treatment centers such as now exist at Longwood and are being created in Hampden County with encouragement that further creative directions be explored by that Department.
7. We recommend that special education programs for members of the local bar and district attorneys be held in every county within the next twelve months chaired by the local member of the Chemical Dependency Committee of the Massachusetts Bar Association and with a local alcohol treatment professional as panelist together with two or three other panelists with backgrounds in the alcohol and drug dependency area of law and treatment with each program tailored to the recommendations of the identified chairman in order to attract the highest level of local participation. In that connection we recommend that Committee member William D. Delahunt write to each district attorney shortly before each program urging his colleagues to stimulate participation by his or her staff. We emphasize the utilization of local personnel, with materials provided by this Committee and by the Chemical Dependency Committee of the Massachusetts Bar Association as the resource materials. The subject of the seminar or program should be the broad category of the alcoholic client and how to identify and cope with him or

her in civil, domestic relations and criminal matters. We think that the time for the presentation should not exceed an hour and a half and that it is important to emphasize the broad spectrum of practice rather than a limited area.

8. We recommend that through the Flaschner Judicial Institute a program be developed for judges, with particular attention to the general recommendations that we have made herein and special emphasis on utilization of General Laws c. 276, section 87 and General Laws c. 276A for purposes of diverting clearly alcoholic defendants into treatment at least when there is voluntary acceptance and willingness to enter such programs. We feel that judges should be urged to provide a longtail of follow-up probation of a supervised type in all alcohol related cases regardless of whether specific programs are adopted. We specifically believe that post treatment participation in probation should include active, informed follow-up by the judge or at least the probation staff to insure that program objectives are being met. To this end we think that at minimum a judge should receive a statistical report on a regular basis whether monthly or quarterly as to the performance of his alcohol related referrals. A minimum of six months post treatment for continued supervised probation is strongly recommended.
9. We recommend that probation officers receive a similar educational program under appropriate auspices and probably those of the Division of Alcoholism with respect to use of the intake form and, most importantly, to assist probation officers in developing techniques for follow-up of posttreatment alcohol related defendants.



DEFENDER'S INTAKE QUESTIONNAIRE  
PREPARED BY THE MASSACHUSETTS BAR ASSOCIATION/  
GOVERNOR'S COMMITTEE ON THE ALCOHOLIC CLIENT

Name _____	Court _____
Address _____	Terms Of Release _____
_____	_____
_____	_____
Telephone - Home _____	Date _____ Proceeding _____
Work _____	Arraigned Before J. _____
Def. DOB _____	Advised Of Right To Counsel _____
Offense Code(s) _____	Advised Of Right To Drug Exam _____
Date Of Offense _____	Advised Of Right To Bail Review _____
Place Of Offense _____	Advised Of Right To F.I. Jury Tr. _____
Complaint _____	Waives Right To F.I. Jury Tr. _____
Police Department _____	Incarcerated: _____
Date Of Complaint _____	Bail: _____
Return Date And Time _____	History of Drugs: _____
Sex: _____	History of Alcohol: _____
Race: _____	Education: _____
Age: _____ Date of Birth: _____	Children: _____
Single: _____ Married: _____	Military: _____
Divorced: _____ Separated: _____	_____
Occupation: _____	_____
Present Employer: _____	_____
How Long at Present Employment: _____	_____
Probation or Parole Outstanding: _____	_____
_____	_____
Previous Record in Mass: _____	_____
_____	_____
Out-of-State Record: _____	_____
_____	_____
Father's Name: _____	Address: _____
Occupation: _____	_____
Mother's Name: _____	Address: _____
Occupation: _____	_____
Wife/Husband: _____	_____
Occupation: _____	_____
Does anyone in family have drug or alcohol problem? Explain: _____	
_____	
_____	
Date Arrested: _____	Day of Week: _____ Time: _____
Charges: _____	
Statutory citations and penalties: _____	
G.L.c.: _____	Section: _____ Time: _____ Fine: _____ Both: _____
G.L.c.: _____	Section: _____ Time: _____ Fine: _____ Both: _____
G.L.c.: _____	Section: _____ Time: _____ Fine: _____ Both: _____
G.L.c.: _____	Section: _____ Time: _____ Fine: _____ Both: _____
Facts: _____	
_____	
_____	
_____	
_____	
_____	
_____	



## EXHIBIT A-2

COUNT OFFENSE				FINE	SURFINE	COSTS	TOTAL DUE
DATE	PLEA Not Guilty      Guilty      Nolo			IMPRISONMENT AND OTHER DISPOSITION			
	New Plea:      Admits suff. facts						
	FINDING      JUDGE						
	Cont. w/o finding until:			FINAL DISPOSITION      DATE			
	Appeal of find. & disp.      Appeal of disp.			: Discharged from probation Dismissed at request of probation			

COUNT OFFENSE				FINE	SURFINE	COSTS	TOTAL DUE
DATE	PLEA Not Guilty      Guilty      Nolo			IMPRISONMENT AND OTHER DISPOSITION			
	New Plea:      Admits suff. facts						
	FINDING      JUDGE						
	Cont. w/o finding until:			FINAL DISPOSITION      DATE			
	Appeal of find. & disp.      Appeal of disp.			: Discharged from probation Dismissed at request of probation			

COUNT OFFENSE				FINE	SURFINE	COSTS	TOTAL DUE
DATE	PLEA Not Guilty      Guilty      Nolo			IMPRISONMENT AND OTHER DISPOSITION			
	New Plea:      Admits suff. facts						
	FINDING      JUDGE						
	Cont. w/o finding until:			FINAL DISPOSITION      DATE			
	Appeal of find. & disp.      Appeal of disp.			: Discharged from probation Dismissed at request of probation			

COUNT OFFENSE				FINE	SURFINE	COSTS	TOTAL DUE
DATE	PLEA Not Guilty      Guilty      Nolo			IMPRISONMENT AND OTHER DISPOSITION			
	New Plea:      Admits suff. facts						
	FINDING      JUDGE						
	Cont. w/o finding until:			FINAL DISPOSITION      DATE			
	Appeal of find. & disp.      Appeal of disp.			: Discharged from probation Dismissed at request of probation			

COUNT OFFENSE				FINE	SURFINE	COSTS	TOTAL DUE
DATE	PLEA Not Guilty      Guilty      Nolo			IMPRISONMENT AND OTHER DISPOSITION			
	New Plea:      Admits suff. facts						
	FINDING      JUDGE						
	Cont. w/o finding until:			FINAL DISPOSITION      DATE			
	Appeal of find. & disp.      Appeal of disp.			: Discharged from probation Dismissed at request of probation			

CONT TO	PURPOSE	CONT. TO	PURPOSE

DATE	TAPE NO.	START	STOP

BACKGROUND

What did you say to the police?\_\_\_\_\_ What did they say to you?\_\_\_\_\_  
 Were Miranda Warnings given to you?\_\_\_\_\_ When?\_\_\_\_\_ Where \_\_\_\_\_  
 What had you said prior to the Miranda Warnings?\_\_\_\_\_  
 Were there any witnesses?\_\_\_\_\_ Please identify:\_\_\_\_\_  
 Did you make any statements to others?\_\_\_\_\_ When and to whom?\_\_\_\_\_  
 Was your vehicle searched?\_\_\_\_\_ Where you searched?\_\_\_\_\_  
 Describe any property taken from you or your vehicle:\_\_\_\_\_

TESTING

Tests Offered: Blood\_\_\_\_\_ Breath\_\_\_\_\_ Urine\_\_\_\_\_ Other\_\_\_\_\_  
 Tests Given: Blood\_\_\_\_\_ Brea h\_\_\_\_\_ Urine\_\_\_\_\_ Other\_\_\_\_\_  
 Given by:\_\_\_\_\_ When Administered?\_\_\_\_\_ Time\_\_\_\_\_ Result\_\_\_\_\_  
 What field sobriety tests were given?\_\_\_\_\_ How did you do?\_\_\_\_\_  
 Did you consider yourself to be under the influence?\_\_\_\_\_  
 Describe how alcohol affected your driving?\_\_\_\_\_  
 When did you start drinking?\_\_\_\_\_ In whose company?\_\_\_\_\_  
 Describe each drink you had prior to your arrest:\_\_\_\_\_  
 What is your weight and body size?\_\_\_\_\_  
 Name, address, and phone number of all person<sup>s</sup> with whom you drank:\_\_\_\_\_  
 \_\_\_\_\_  
 Would these persons be willing to testify? Yes \_\_\_\_\_  
 No \_\_\_\_\_  
 Did you consume any alcohol after your arrest?\_\_\_\_\_ What and when?\_\_\_\_\_

MEDICAL HISTORY

Are you under the care of a doctor?\_\_\_\_\_ Please identify:\_\_\_\_\_  
 Had you seen a dentist within 24 hours of your arrest?\_\_\_\_\_ Identify:\_\_\_\_\_  
 Do you have any physical disability?\_\_\_\_\_  
 Do you have any injuries that would cause you to look intoxicated?\_\_\_\_\_  
 Were you taking any medicine or drugs such as cold pills, antihistamines, tranquilizers, weight control pills, aspirin, etc.?\_\_\_\_\_  
 List all chemicals taken in last six months:\_\_\_\_\_  
 Was your stomach upset at the time of your arrest?\_\_\_\_\_  
 Do you wear glasses?\_\_\_\_\_ Contact lenses?\_\_\_\_\_ Corrective reading\_\_\_\_\_  
 How many hours had you worked prior to the arrest?\_\_\_\_\_

CONDITION OF CAR AND ROADWAY

Steering mechanism-last date of repair or examination:\_\_\_\_\_  
 Describe any mechanical defects in your car:\_\_\_\_\_  
 Weather and Road Conditions:  
 Blacktop\_\_\_\_\_ Dirt Road\_\_\_\_\_ Other\_\_\_\_\_  
 Dark\_\_\_\_\_ Light\_\_\_\_\_ Foggy\_\_\_\_\_ Rainy\_\_\_\_\_  
 Sleet\_\_\_\_\_ Hail\_\_\_\_\_ Snow\_\_\_\_\_ Drizzle\_\_\_\_\_  
 Slippery\_\_\_\_\_ Normal\_\_\_\_\_ Wet\_\_\_\_\_ Dry\_\_\_\_\_

IMPLIED CONSENT

Were you advised that you could take another test?\_\_\_\_\_  
 Were you advised that you could contact an attorney?\_\_\_\_\_  
 Were you provided with a private room to call your attorney?\_\_\_\_\_  
 Name of attorney contacted:\_\_\_\_\_  
 Were you told that you were under arrest?\_\_\_\_\_

This court provides alcohol and drug assessments for any person who feels that they would benefit from help for problems of substance abuse. There is no charge and information obtained will not be used against you. If you require and accept treatment, that may be considered in your favor by the Court.

**DRUG LAW RIGHT (Chap. 111E sec. 10)**

Any defendant who is charged with a drug offense shall, upon being brought before the court on such charge, be informed that he is entitled request an examination to determine whether or not he is a drug dependent person and that if he chooses to exercise such right he must do so in writing within five days of being so informed.



**TRIAL COURT OF THE COMMONWEALTH**  
District Court Department - Northampton Division  
15 Gothic Street, Northampton, Mass. 01060

Your case has been continued to \_\_\_\_\_ at

- ☐ 8:30 a.m. for pre-trial conference
- ☐ 9:00 a.m. for disposition
- ☐ 9:00 a.m. for trial

KEEP THIS CARD - you will receive no other notice.

FAILURE TO APPEAR WILL RESULT IN WARRANT BEING ISSUED. If you have a drug or alcohol problem a free eval-

You have: evaluation is available. Call \_\_\_\_\_ if you feel that you would benefit.

- ☐ Been appointed a Bar Advocate lawyer, and you should report to the Bar Advocate Office as soon as possible.
- ☐ Been denied Bar Advocate lawyer - determined to have sufficient funds to hire your own lawyer.
- ☐ Indicated you will hire your own lawyer.



COMPLAINTS (WITH DOCKET #'S)

EXHIBIT "C"

DATE

D.C. DIVISION

DEPARTMENT

## PRE-TRIAL INTAKE REPORT

DISTRICT COURT DEPARTMENT/BOSTON MUNICIPAL COURT DEPARTMENT

NAME \_\_\_\_\_ ALIAS/MAIDEN/PRIOR MARRIAGE \_\_\_\_\_

ADDRESS \_\_\_\_\_ LIVING WITH \_\_\_\_\_

TELEPHONE # \_\_\_\_\_ OTHER RESIDENCE(S) PAST YEAR: \_\_\_\_\_

DOB: \_\_\_\_/\_\_\_\_/\_\_\_\_ POB: \_\_\_\_\_ I.D. VERIFIED: Y\_\_\_\_N\_\_\_\_ METHOD: \_\_\_\_\_

U.S. CITIZEN: Y\_\_\_\_N\_\_\_\_

HT: \_\_\_\_ WT: \_\_\_\_ HAIR: \_\_\_\_ EYES: \_\_\_\_ SEX: M F RACE: \_\_\_\_\_ S.S. # \_\_\_\_\_

### FAMILY AND MARITAL STATUS:

FATHER: \_\_\_\_\_ MOTHER: (MAIDEN) \_\_\_\_\_

MARITAL STATUS: S M W SEP. \_\_\_\_\_ DIV \_\_\_\_\_ SPOUSE: (MAIDEN) \_\_\_\_\_  
(date) (date)

NUMBER OF DEPENDENTS: \_\_\_\_\_ RELATIONSHIP: \_\_\_\_\_

### EMPLOYMENT RECORD:

OCCUPATION: \_\_\_\_\_ DATE OF PRESENT EMPLOYMENT: \_\_\_\_\_

NAME AND ADDRESS OF EMPLOYER: \_\_\_\_\_  
\_\_\_\_\_

EMPLOYMENT DURING PAST YEAR: \_\_\_\_\_  
\_\_\_\_\_

PRIOR RECORD: PRIOR: Y\_\_\_\_N\_\_\_\_ JUVENILE\_\_\_\_ADULT\_\_\_\_OUT OF STATE \_\_\_\_\_

PROBATION/PAROLE STATUS: \_\_\_\_\_ NAME OF SUPERVISOR: \_\_\_\_\_

ATTORNEY: C.A.\_\_\_\_WAIVE\_\_\_\_UNDECIDED\_\_\_\_PRIVATE (NAME): \_\_\_\_\_

ADDITIONAL COMMENTS: (Note physical/emotional problems; substance abuse, etc.)

Does this case require alcohol intake assessment? \_\_\_\_\_ Assessment done \_\_\_\_/\_\_\_\_/\_\_\_\_

Probation Officer: \_\_\_\_\_



### ALCOHOL/DRUG USE INQUIRY

Consistent information developed from our Courts supports the firm conclusion that alcohol or drugs (usually "legal") are involved in more than 3 out of 4 cases in the District Court. These questions are designed to help the practitioner to assess the possible effect on the Defendant and to provide access to competent assistance. The information is privileged and should not be disclosed without your client's permission.

1. Have you ever felt that you ought to cut down on your drinking?
2. Have people annoyed you by criticism of your drinking?
3. Have you ever felt bad or guilty about your drinking?
4. Have you ever had a drink first thing in the morning to steady your nerves or to get rid of a hang-over (Eye-opener)?
5. Do you use drugs or other chemicals to feel better whether or not by prescription?
6. Does anyone close to you have a drug or alcohol problem?
7. Does their problem present difficulty to you?

The following agencies should be considered for evaluation and assistance if your client reports positive answers to some of the above questions:

## CHAPTER V

### REPORT OF ETHICAL STANDARDS SUBCOMMITTEE: ETHICAL ISSUES IN REPRESENTING THE ALCOHOLIC CLIENT

#### I. INTRODUCTION

The practicing attorney is in a unique position to be able to identify the alcoholic client. The current focus and recognition of alcoholism as a disease moves lawyers to assist the client into treatment. However, the client's disclosures are usually made within the strictures of the confidential relationship inherent in the lawyer's representative capacity. Some of these problems usually arise in the context of domestic cases, business or financial failures and criminal charges, where alcoholic related problems are the root cause of the client's legal dilemma. Because the attorney has special status and leverage in his relationship, everything he/she says and does has special significance.

Principally, the lawyer has an obligation to represent a client zealously within the bounds of the law.<sup>1/</sup> A number of the Disciplinary Rules (DR's) and Ethical Considerations (EC's) may be construed to encourage certain practices in the handling of cases where alcoholism appears to be an underlying problem. However, as every advocate undertakes to advance his/her client's cause,<sup>2/</sup> there may be occasions when the clear demarcation between the lawyer's role as an advocate becomes skewed.<sup>3/</sup> This arises out of the lawyer's awareness that the best interest of a client may dictate less than zealous advocacy in favor of disclosure of the addiction to a court, to a treatment agency or to an opposing counsel.

The purpose of this subcommittee report is to outline those actions which counsel may ethically undertake without violating the primary duty to preserve the lawyer-client relationship and to describe the limitations inherent in the process through a series of hypothetical situations.

The Canons of Ethics and Disciplinary Rules as adopted under Rule 3:07 of the Supreme Judicial Court Rules do not expressly mention a special obligation owed by an attorney to the alcoholic client beyond that owed to any client. A number of the Disciplinary Rules (DR's) and Ethical Consideration (EC's), however, may be construed to encourage or discourage certain practices in the handling of cases where alcoholism, whether that of the attorney's client or of another party involved, appears to be an underlying problem.

It is difficult and artificial to categorize the relevant DR's and EC's as dictating one response or another, but for organizational purposes we have divided the relevant provisions into two general groups: those that, by their language, provide an ethical basis for the attorney to actively help a

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<sup>1</sup>The Subcommittee acknowledges the contribution of Chapter IV of the report by David Hoover, Esquire, 100 Cambridge Street, Boston, MA 02202.

client address his/her drinking problem, and those that narrow the options available to the attorney. That many of these provisions fall into both categories is a testimony to the vagueness of the codified ethical guidelines.

Both the DR's and the EC's are numbered to correspond with the eight Canons of Ethics. Thus, in reviewing, first, the "activist" passages and, second, the "limiting" provisions, we will examine the relevant DR's and EC's according to the numerical order of their parent Canons.

## II. ACTIVIST PROVISIONS

**Canon 2: A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.**

DR 2-110, entitled "Withdrawal from Employment", provides under subsection (B)(3) that a lawyer must withdraw from a case if "his mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively." DR 2-110(c) provides that a lawyer may request permission to withdraw from a case where, among other circumstances, the client "(p)ersonally seeks to pursue an illegal course of conduct," or where the lawyer's "mental or physical condition renders it difficult for him to carry out the employment effectively." The effect of these DR's upon the "activist" attorney is to provide a justification for giving the alcoholic client an ultimatum such as: "I will represent you only if you commit yourself to undergoing treatment and if you follow through." Some examples may be helpful here. Consider the client who has been charged with operating under the influence for the third time, who is a self-avowed alcoholic, and who refuses to undergo any kind of substance abuse treatment. The attorney might conclude that this client is "personally seeking to pursue an illegal course of conduct" within the scope DR 2-110(c). A similar situation might arise in the case of a client who has a history of becoming violent and committing unlawful assaults when under the influence of alcohol but who refuses treatment. One might construe DR 2-110(c) as releasing the attorney from any obligation to represent such clients.

In other cases, the attorney may not feel that the client is implicitly choosing to break the law by continuing to drink, but the attorney might still be justified in giving the client the above mentioned ultimatum. Although an attorney should not lightly turn away any person in need of legal assistance (see Canon 2 and EC 2-26), the attorney here may in effect be saying, "I am ready and willing to represent you. But I have such strong feelings about alcoholism and its destructive effect on people's lives, that I cannot adequately represent individuals who I think are unwilling to help themselves. My personal frustration and resentment would interfere with my professional effectiveness." This state of mind may be particularly applicable to attorneys who are themselves recovered alcoholics. Arguably, their "mental or physical condition renders it difficult" for them to zealously advocate the client's interest in such cases. EC 2-30 further cautions, "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client".



The primary purpose of these provisions is to maintain high standards of performance in the legal profession by excusing lawyers from representing clients for whom they may be unable to do their best work. But practically speaking, the attorney who wishes to influence the alcoholic client's conduct will use a conditional offer of representation more as a form of leverage - or perhaps coercion, in the eyes of the client - than as a protection against mediocrity.

One other duty arising under Canon 2 deserves mention. EC 2-1 provides that an "important function of the legal profession [is] to educate laymen to recognize their problems". In the context of the surrounding provisions, it is clear that the "problems" referred to in this passage are legal problems. Still, it is reasonable to read into this language an affirmative obligation of lawyers to educate laypeople about the relationship between alcoholism and legal difficulties.

**Canon 5: A lawyer should exercise independent professional judgment on behalf of a client.**

DR 5-101(A) and EC 5-2 require the lawyer to refuse employment if the lawyer believes his/her personal interest will adversely affect the services to be given the client. Without really adding anything new, these provisions lend further support to the lawyer who will only represent alcoholic clients on the condition that they undergo some kind of treatment.

**Canon 7: A lawyer should represent a client zealously within the bounds of the law.**

The EC's that elaborate on Canon 7 provide the "activist" lawyer with the most useful language in the code. Though vague, these EC's invite the lawyer to transcend the limits of strictly "legal" counseling, the implication being that few legal problems are purely legal. The relevant excerpts speak for themselves:

EC 7-8 . . . Advice of a lawyer to his [sic] client need not be confined to purely legal considerations . . . A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions . . .

EC 7-10 . . . The duty of a lawyer to represent his client with zeal does not militate against his [sic] concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm . . .

EC 7-11 . . . The responsibility of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . .

EC 7-12 . . . Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities on his lawyer . . .

These EC's suggest that the lawyer has an obligation to counsel the alcoholic client to address his/her drinking problem if the lawyer believes it is contributing the client's legal problem. Beyond this, it is unclear how far the lawyer should or is permitted to go in influencing the client's conduct. Apart from laying down a general principle, EC 7-10 does not help the lawyer determine, in a particular factual situation, whether the obligation to avoid the infliction of needless harm supercedes the obligation to represent the client who chooses a lawful though inconsiderate or self-destructive course of action.

### **III. LIMITING PROVISIONS**

**Canon 2 (revisited): A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.**

DR 2-106(A) prohibits a lawyer from charging a "clearly excessive fee." Under 2-106(B) a fee is "clearly excessive" when it is substantially greater than that which a reasonably prudent attorney, experienced in the same area of law, would consider reasonable. Subsections (1) through (7) of DR 2-106B go on to list the factors to be considered in determining whether a fee is reasonable. These factors include the time and labor required, the difficulty of the questions involved, the fee customarily charged in the locality, the results obtained, the time limitations imposed by the case, whether the fee is fixed or contingent and the experience, reputation and ability of the lawyer.

This DR would seem to rule out one approach to encouraging the alcoholic client to seek treatment. According to this rule a lawyer may not say to a prospective client, "I will represent you in your O.U.I. charge and get you a good result for \$500.00 if you undergo treatment or, if you will not admit yourself to a treatment program, I will represent you as best I can for a fee of \$3,000.00." This would be improper if \$3,000.00 were a clearly excessive fee. Nothing in DR 2-106, however, would seem to prohibit the lawyer from offering a substantially reduced fee, as a kind of incentive, to the client who will undergo treatment. This latter situation amounts to the offering of pro bono services, a practice which is certainly encouraged by the ethical code, and particularly by Canon 2.

EC 2-26 simply states the general proposition that all lawyers must shoulder their share of undesirable employment. The goal of such a rule is that no members of society be denied adequate legal representation either because of their inability to pay or the unpopularity of their cause. In a sense, this doctrine cuts against lawyers refusing to represent clients who choose not to address their own drinking problems. Obviously if every lawyer adopted this approach these people would be unable to obtain legal counsel.

**Canon 4: A lawyer should preserve the confidences and secrets of a client.**

DR 4-101 and EC's 4-1 through 4-6 discuss the nature and the scope of the lawyer's duty to protect the confidentiality of his/her relationship with the client. The ethical duty is broader than the evidentiary attorney-client privilege. As explained in EC 4-4, "(t)his ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."



In the course of legal consultation, a client may confide to the lawyer that the client has a drinking problem. The lawyer may respond by asking questions to discover the full extent of the problem, by advising the client to seek professional help to treat the alcoholism or by making referrals to the client. The lawyer may not, however, notify any other person or agency of the client's drinking problem without the express consent of the client. The fact that others may be aware of the client's alcoholism is immaterial to the lawyer's duty to preserve this confidence. DR 4-101 (c)(3) may provide the only applicable exception to the protection of this "secret" by permitting<sup>4/</sup> the lawyer to disclose "the intention of his client to commit a crime and the information necessary to prevent the crime." This may arise when the client expresses to the lawyer an intent to get drunk and then drive somewhere, when the client arrives at the lawyer's office in a drunken stupor and expresses an intent to commit a violent act against another person or in a host of unforeseeable situations where alcohol is a catalyst to unlawful conduct.

**Canon 7 (Revisited): A lawyer should represent a client zealously within the bounds of the law.**

DR 7-101(A)(1) mandates that "A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B)." DR 7-101B allows the lawyer room in the representation of a client to "exercise his [sic] professional judgment to waive or fail to assert a right or position of his client,; and "to aid or participate in conduct that he believes to be lawful," even though there is a tenable position to the contrary.

The EC's flowing from Canon 7 differentiate between the lawyer as advisor and the lawyer as advocate. EC 7-5 describes the lawyer's role as advisor as the rendering of a professional opinion about how the court is likely to rule and about the practical implications of certain legal decisions. EC 7-5 provides that a lawyer may continue to represent a client who has chosen to pursue a course of action that is contrary to the lawyer's advice, as long as it is not unlawful.

EC 7-12 was mentioned earlier in connection with the lawyer's special responsibility to the client who, due to a mental or physical condition, is incapable of making a considered judgment on his/her own behalf. The conclusion of EC 7-12 is perhaps a fitting conclusion of this section. After discussing the lawyer's affirmative obligation to the especially needy client, EC 7-12 cautions the lawyer against carrying the crusade too far:

. . . the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interest of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.



#### IV. MODEL CODE AND MODEL RULES OF THE ABA

In addition to analyzing the current ethical code in Massachusetts, the subcommittee also considered the recently proposed American Bar Association (ABA) Model Code and Model rules now under consideration in various states.

. . . [I]f the Model Rules are viewed as part of a process of intensive re-examination of basic issues affecting both the legal profession and society rather than as the "black" letter embodiment of the answer to our problems they will have proved to be valuable whether or not they are adopted. For what we need is not only dialogue between us and our clients but also dialogue between ourselves as lawyers. American Bar Foundation Research Journal, 1980 p. 1003.

Rule 1.14(a) of the ABA Model Rules acknowledges that when representing a client an attorney may discover that the client's "ability to make adequately considered decisions in connection with the representation is impaired . . . ." Ethical Consideration 7-12 states: "Any mental or physical condition of a client that render him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer." EC 7-12 equates this to a client disability.

The ABA has recognized that a disability and a disabled client may be the result of alcohol or drug addiction.<sup>5/</sup> There are also judicial pronouncements on the disabling effect of alcohol and judicial conclusions that alcoholism is both a disability and a physical and mental impairment.<sup>6/</sup> For example, in reviewing the denial of social security disability benefits to an individual suffering from alcoholism the District Court for the Eastern District of New York concluded that the agency "must consider and decide whether or not the Plaintiff is totally disabled because he has through his addiction to alcohol so far lost self-control that he is impotent to seek and use means of rehabilitation . . . ." <sup>7/</sup> In making this determination the Eighth Circuit has advised the Secretary that the testimony of a chronic alcoholic that "quitting drinking, there is no great problem there . . . I enjoy it, and I don't - I don't think the beer hurts me particularly . . . ." are otherwise statements which represent "the rationalizations of a sick individual who does not realize the extent of his illness."<sup>8/</sup> The court concluded that such testimony cannot form the sole basis for a finding of no disability.<sup>9/</sup>

In Griffis v. Weinberger the Ninth Circuit Court of Appeals found that the "proposition that chronic acute alcoholism is itself a disease, a medically determinable physical or mental impairment, is hardly debatable today."<sup>10/</sup> And in Ferguson v. Schweiker the Fifth Circuit Court of Appeals noted that it "is well-stated that alcoholism alone or combined with other causes, can constitute a disability if it prevents a claimant from engaging in substantial gainful activity." The court concluded that "a finding that an individual is not disabled by alcoholism cannot rest solely upon the testimony of the individual himself, since such testimony may be filled with the rationalization of a sick individual who does not realize the extent of his illness."<sup>11/</sup>

Clearly the courts have recognized that alcoholism is a disability which results in a physical and mental impairment and the judicial statements in support thereof would appear to fall within the language of Rule 1.14(a) and EC 7-12. Given that the lawyer-client relationship is somewhat different when the client is alcoholic how then may a lawyer, or more pointedly should a lawyer, represent such a client? The answer to this question may be found in the lawyer's role as advisor and in ethical opinions from the various states.

Rule 2.1 of the Model Rules provides in relevant part:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Note that the lawyer must exercise this independent judgment according to the Rule when advising the client. It is also stressed that the lawyer should be candid no matter how unpleasant that advice may be.<sup>12/</sup> Although in most cases the decisions of the alcoholic client would be binding on the lawyer, this does not and should not relieve the lawyer from exercising his or her independent decision making by strongly urging treatment. Surely, such urgings to the client charged with driving under the influence of alcohol are based on valid and legitimate social considerations that must be stressed to the client.

In one ethical opinion a lawyer who is representing a client pleading guilty to driving while intoxicated may recommend to the client that he request sentence for an in-patient alcohol treatment program if the lawyer determines that it is in the best interests of the client.<sup>13/</sup> If the client insists on choosing a course of action which the lawyer deems imprudent, the lawyer may withdraw.<sup>14/</sup> In another ethical opinion a lawyer who holds \$37,000.00 in escrow for a 19-year old client who is cross addicted to alcohol and drugs must turn the funds over to the client even though the lawyer knows they will be squandered.<sup>15/</sup> However, the lawyer may advise the client to seek proper treatment for the cross dependency.<sup>16/</sup>

Finally, the ethical opinions seem to distinguish between representing an alcoholic client and representing a nonalcoholic client when the client disappears. In the former instance it is recommended that the lawyer initiate proceedings appropriate for determining how to continue with the cause of action.<sup>17/</sup> The opinion goes on to recommend that the attorney could apply for a conservatorship, guardian ad litem or a similar measure to invoke the court's jurisdiction. The court could authorize the conservator or guardian to decide the course of the law suit.<sup>18/</sup> On the other hand, where a nonalcoholic client disappears prior to filing a cause of action, the attorney need only exercise due diligence in locating the client and, despite a tolling of the statute of limitations, there is no obligation for the attorney to file the law-suit.<sup>19/</sup>

The Model Code and the Model Rules make specific provision for the representation of a client suffering from a disability. Such provision is generally an additional responsibility of the lawyer as advisor to make decisions in the best interest of the client that the client may otherwise be incapable of making due to the disability. In making these independent decisions an attorney as advisor may consider other factors such as societal needs. The ABA and the courts recognize that alcoholism is a disability. The ethical opinions further suggest that the lawyer as advisor has a great deal of discretionary independence and thus additional responsibilities when representing the alcoholic client. These additional responsibilities neither apply to the lawyer in his or her roles, nor do they apply to the lawyer representing a client not afflicted with the disease of alcoholism.<sup>20/</sup>



## FOOTNOTES

- 1/ Canon 7, Rule 3:07 of the Supreme Judicial Court Rules does not adopt the Ethical Considerations (EC) as appearing in the American Bar Association "Code of Professional Responsibility and Judicial Ethics" (1970) but subsection (2) of Rule 3:07 provides that the EC form a body of principles upon which the Canon of Ethics and Disciplinary Rules, as herein adopted, are to be interpreted.
- 2/ Lord Brougham stated the traditional view of the lawyer's role during his defense of Queen Caroline: [A]n advocate, in the discharge of his duty, knows but one person in all the world, and the person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.  
2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821).
- 3/ See The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation. Charles Fried (1976).
- 4/ It is noteworthy that DR 4-101(c) reads, "A lawyer may reveal," thus permitting but not requiring disclosure under the circumstances listed.
- 5/ Canons 5, 6 and 7.
- 6/ American Bar Association, Bureau of National Affairs, Inc., Lawyers Manual on Professional Conduct, 1984 (hereinafter cited as "Lawyers' Manual") 31:601.
- 7/ Badicheck v. Secretary of Health, Education and Welfare, 374 F.Supp. 940, 942 (E.D. N.Y. 1974).
- 8/ Adams v. Weinberger, 548 F.2d 239, 245 (1977).
- 9/ Id.
- 10/ 509 F.2d 837, 838 (1975).
- 11/ 641 F.2d 343, 248 (1981).
- 12/ Lawyers' Manual, 31:601.
- 13/ MD 84-18 (1983), Lawyers' Manual, 801:4336.
- 14/ Id. citing Canon 7, EC 7-8.
- 15/ MD 84-56 (1983), Lawyers' Manual, 801:4339.

16/ Id. citing EC 7-8, 7-11: DR 9-102(B)(4).

17/ Iowa 81-15 (1981), Lawyers' Manual, 801:3606.

18/ Id.

19/ Inf. Op. 1467 (1981), Lawyers' Manual, 801:314.

20/ One commentator argues:

If the client expresses ends which, due to imprudence or excessive moralism, seem selfdestructive, it is the lawyer's job to voice the conservative and restrained point of view. It is the lawyer's job to question the client's competence where it may need questioning.

D. Luban, Paternalism and the Legal Profession, 1981 Wis.L.R. 454, 493.

Another commentator recognizing the degree of decision making control that the attorney exercises over the client writes:

Little discussed until recently has been the fact that, despite this ideology, lawyers in many cases significantly control their clients' decisions and exert broad discretion over the means necessary to implement decisions.

M. Spiegel, The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue, 1980 A.B.F. Research J. 1003.

## ETHICAL HYPOTHETICAL SITUATIONS

Presented here are a series of hypothetical situations which are commonly faced by attorneys. Although they may offer some guidance as to how to resolve an ethical conflict with an alcoholic client, they also demonstrate the ambiguous nature of the ethical provisions in the Model Code and Model Rules. In many of these situations, the activist attorney interprets the provisions very differently from the traditional attorney. Each response contains the approach that could be taken by an activist attorney contrasted with the approach that could be taken by a more traditional attorney. Although further clarification of the rules is necessary, it is clear that there are some steps an attorney may take to help his or her client help himself or herself in nearly every situation.



## EXAMPLE ONE

Approximately fifteen (15) years ago John Smith (a non-client and non-friend) walked into your office and asked you to incorporate a new business entity to be known as Smith Industries, Inc. Since that time, you have acted as personal counsel to Mr. Smith and corporate counsel for his diverse business interests. Over the years, as Mr. Smith's business ventures prospered, other individuals became minority shareholders in the company, but Mr. Smith has maintained majority control as shareholder and Chief Executive Officer.

Recently, you were contacted by the accountants for Smith Industries and advised that the company was in serious financial trouble, that Mr. Smith had made a series of business decisions within the past nine (9) months which were ill advised and not recommended by the accountants or other corporate officers. Additionally, the accountants advised you of various noncorporate expenditures by the company which were specifically authorized by Mr. Smith. Presently, the company cash surplus has been depleted and the company is unable to meet current obligations. Although faced with this bleak corporate picture, you are advised that Mr. Smith insists that the company incur new debt obligations in an effort to "bail out" previous, failed corporate programs. Mr. Smith has sufficient voting control to get his way.

Nine (9) months ago, Mr. Smith's wife of twenty-five years passed away. The Smith's had no children. During the past nine (9) months, when you have been in Mr. Smith's company, you have observed him drinking uncharacteristically large amounts of alcohol. You have heard from friends and business associates that Mr. Smith has been drinking on a daily basis, that he is often late for work or does not show up at all and that although customarily a kind and considerate man, Mr. Smith's recent conduct at work can be characterized as loud, belligerent, inconsiderate and rude.

Smith Industries is in a crisis financial situation and Mr. Smith is in a crisis personal situation. You have attempted to speak to Mr. Smith about the status of his company and his personal life, but he fails to see any problems or have any concerns about his drinking. Mr. Smith steadfastly denies that his recent drinking is in any way related to the failures of his business.

What are your professional obligations to Smith Industries, Inc., its minority shareholders and concerned management? What are your professional obligations to Mr. Smith?

Both Attorney A and Attorney T realize that, for the first time, there is a conflict between the interests of John Smith and Smith Industries.

## RESOLUTION

### "Activist Attorney"

Attorney A requests that John Smith come in for a conference. Smith complies. At the conference, Attorney A explains to John Smith that he per-

ceives a conflict between the interests of Smith Industries and Mr. Smith. He explains that ethical considerations preclude him from continuing as an adviser to both. Because of the long standing business relationship between Mr. Smith and Attorney A and because his representation of Mr. Smith personally predates his representation of Smith Industries, Attorney A decides that he must first offer his services to Mr. Smith. Attorney A explains that Mr. Smith must decide whether to retain him as his personal attorney. Attorney A feels it is only fair to give Mr. Smith a preliminary outline of how he sees his duties of representation. Attorney A recites the rumors he has heard about Mr. Smith. Attorney A also says that he has been surprised to note how much Mr. Smith had to drink when they were at a recent meeting together. Attorney A makes it clear that he has come to no conclusions nor made any judgments concerning the truth of said rumors or the problems at Smith Industries. But, because of the recent precipitous decline of Smith Industries, which Attorney A cannot readily attribute to Smith's recent bereavement, and Attorney A knows that the past successes were due almost wholly to the efforts of Mr. Smith, Attorney A informs Mr. Smith that he will not represent him unless Mr. Smith goes for a complete physical to a reputable clinic. Attorney A, previous to the meeting, has obtained the names of several clinicians who have worked with alcoholics and will include alcoholic screening in a health review. Attorney A tells Mr. Smith that Mr. Smith should begin to keep a diary of his arrivals and departures at Smith Industries. Attorney A also asks that Mr. Smith keep records of any personnel problems which occur henceforth, including date, time, participants and an explanation of the problem and its resolution. Attorney A impresses upon Mr. Smith the seriousness of the charges which could be leveled against him and apprises him that he could lose control of Smith Industries unless he meets the business problems head on, including the accusations against his character. Attorney A stresses that he is Smith's personal advocate and that publically and in connection with all the business associations at Smith Industries, Attorney A will take Smith's part to the best of his abilities. However, he makes it clear that if Attorney A comes to the conclusion that Mr. Smith is the problem with Smith Industries, Attorney A will not mince words in telling him so. Attorney A asks Mr. Smith to mull over what he has said and get back to him.

### "Traditional Attorney"

Attorney T believes that because he is on retainer from Smith Industries and work was done for Mr. Smith on a piecemeal basis only that he represents Smith Industries. Attorney T calls in Mr. Smith and explains that there is a conflict between his representation of Smith Industries and Mr. Smith and he wants to be sure that Mr. Smith realizes that he represents Smith Industries. Attorney T explains that the accountants have advised Attorney T of financial difficulties of Smith Industries and allegations of improper use of funds. Attorney T informs Mr. Smith that he will make his own assessment of the situation and review the appropriate law and will prepare a memorandum to be distributed to the directors. Though he does not mention it to Mr. Smith, Attorney T has put his legal staff to work on the current status of the law on the rights of minority shareholders and the rights of the shareholders and/or the directors, according to the by-laws of Smith Industries, to oust management--both with a view towards blocking Mr. Smith's proposed new financing schemes.



## EXAMPLE TWO

The Middlesex County Probate Court has advised you that you have been appointed counsel of Joyce Bell, the mother of Nathan (age 4) and Noah (age 3) Bell, relative to a G.L. c. 210 petition filed by the Commonwealth of Massachusetts, Department of Social Services. Said Department is seeking the adoption of both minor children without the consent of Joyce Bell.

Relevant information which you received from the Department's case worker indicates that Joyce Bell is twenty-six (26) years of age, unemployed and a recipient of welfare benefits. That over the past three or four years, Ms. Bell's children have been in and out of foster homes pursuant to the intervention of the Department of Social Services. That the records of the Department indicate that Joyce Bell is a chronic alcoholic, that she has neglected and abused her children (nutritional deficiencies and failure to thrive), that she has been unable to provide a stable home environment, that she has failed to meet the requirements of any contracts she has entered with the Department regarding visitation, etc., and that Joyce has refused to seek psychiatric and/or alcoholic counseling.

Numerous attempts to contact your client have provided fruitless as Ms. Bell cannot maintain a constant residential address. Eventually, you locate Ms. Bell at the Framingham House of Correction where she is presently an inmate serving a 30 day sentence for larceny. At your initial interview with Joyce at Framingham, she is sober and cognizant of the Probate and Family Court proceeding relative to her children.

Although uneducated and herself the offspring of abusive and alcoholic parents, Joyce voices a sincere desire to maintain a parental relationship with her children. She steadfastly refuses to consent to the adoption of her children and demands that you use all your legal skills to fight the Department's petition. Although she acknowledges having some difficulty in raising her children, she believes that given time and understanding, she will get her feet on the ground, get a job and establish a solid home environment. Joyce admits that she drinks occasionally but can draw no correlation between her drinking and her inability to function as a parent. She believes she does not need any alcoholic counseling.

What course of action should you take in representing Joyce Bell in regard to the Department of Social Services Petition?

## RESOLUTION

In this example, Attorney A and Attorney T should act identically. Ms. Bell wants to keep custody of her children. Despite the denial of an alcohol problem (and even if the denials are true), the attorney should realize that allegations of alcohol will harm Ms. Bell's legal position. It is the duty of both Attorney A and Attorney T to convince Ms. Bell that, whether she believes it is necessary or not or whether it is, in fact, necessary, she is going to have to take steps to deal with the problem with alcohol which DSS is going



to bring up. The attorney, using whatever powers of persuasion he or she has, must convince the client that her denial of a problem is not going to hold any water with any court given her inability to maintain a stable address and her infractions with the law. It would be to her advantage actually to blame her past problems on alcohol and show the Court that she is making strong and diligent attempts to combat a defined problem. The attorney must convince Ms. Bell that the Court is going to look out for the children first and foremost. The attorney must also recognize that he or she may have to do the leg work regarding finding an appropriate program for Ms. Bell. The attorney should also begin researching ways to delay the speedy progress of the Department's Petition as Ms. Bell is obviously going to need time to work out her problems.

### EXAMPLE THREE

Your client is a 55 year old married man with two grown children who continues to be gainfully employed as a laborer. Having been before the Court on his third separate G.L. c. 209A action, the Defendant recently has been ordered to vacate the premises for a period of one year, but continues on a friendly basis with his wife. The incident which was the basis of the latest vacating order also resulted in the police bringing complaints against the Defendant for assault and battery on a police officer (2 counts) and assault by means of a dangerous weapon upon his wife. These actions occurred while the Defendant was drunk and he remembers little of them. You represent him only as to the criminal complaints.

The Defendant readily admits having an alcohol problem and has asserted his willingness to take action to help himself in that regard. Recently, you have learned that he does very little except talk about his problem and how serious he is and will be in not drinking.

As a result of conferences with the local police and the District Attorney's office, and based upon the client's affirmations, you have secured their cooperation in continuing the criminal complaints on a monthly schedule based upon the Defendant's promise of treatment. At this point you are not at all convinced that the Defendant is serious about securing treatment and have grave concerns as to your obligations in light of the representations made to the prosecution and as to what pressures, if any, you should put upon your own client.

You are in a position where the only help you can render to your client is to secure an amicable disposition of the complaints based upon prior assertions made to you, the strength of which you now question. The dilemma you face is whether disclosure on your part as to these doubts under the Rules constitutes a breach of confidentiality and violation of the attorney/client privilege.

#### Resolution

#### "Activist Attorney"

This case is a typical example of a situation where an attorney is torn between his personal feelings and his legal obligations. Under DR-210(c),

the lawyer could threaten to withdraw from the case unless the client actually commits himself to undergo treatment. He could argue that because of his client's tendency to become violent under the influence of alcohol, he is "seeking to pursue an illegal course of conduct" under DR-210(c). Therefore, the attorney would be justified in withdrawing from the case if the client did not respond to his ultimatum. He could also try to withdraw from the case by asserting that his personal feelings have overcome his professional judgment to the extent that it is impairing his ability to advise his client. There is justification for his posture in DR 5-101(A).

However, the attorney may decide that he cannot withdraw from the case solely because of his personal aversion to it. Canon 2 obligates an attorney to make legal assistance available even when it is undesirable. If he does remain with the client, he does not have to ignore completely his client's problem.

If the alcoholism is contributing to the client's legal problems, as in this situation, the lawyer is justified in encouraging him to seek help. (See EC 7-8 through 7-12, which elaborate Canon 7). The lawyer may also justify his actions under EC 7-8's premise that a lawyer has a moral, as well as a legal obligation to meet in serving his client.

### "Traditional Attorney"

An attorney would probably be able to represent his client without confronting his alcoholism at all under the Model Code and Model Rules.

Under Canon 4, a lawyer is obligated to preserve confidential information told to him by his client. Therefore, Attorney T would be justified in not reporting to the court his client's lack of serious commitment to any alcohol abuse program. However, if the client told the attorney, "I'm going to break my wife's head open when I get home", he would be allowed to reveal the problem under DR 4-101(c)(3). The attorney could also argue that it is none of his business if the client does not follow his advice, as long as the client does not actually threaten to break the law. This would be in accordance with EC 7-5 which allows continued representation even when the client does not listen to his attorney's advice.

### EXAMPLE FOUR

Your client is John Doe, the son of Mr. James Doe, a business client whose work provides about one-third of your income.

James Doe is a hot-headed, somewhat ruthless, businessman. He has talked about his son over the years and believes that his son can do no wrong.

John is nineteen years old. He is a sophomore at a local college. He tells you that he is doing well and that he plans to go into business like his dad.

John is charged with breaking and entering in the night with intent to commit larceny. This event occurred when he was on a Continuance Without a



Finding on a previous charge. He tells you the other case was a B & E, too, but that the judge went easy on him because he was drunk at the time of the incident. He pretends not to know any other details. He says he does not know and cannot imagine what the basis for the current charge is.

You get the police report. You learn from it that at 7:30 a.m., in broad daylight, the victim's garage door was opened with a loud noise. The victim was dressed for jogging. He went to investigate. He saw a young man running from his garage to an empty parked car. He did not get a good look at the man, but he did get the license number of the car. The police traced the number to John's car. They went immediately to his home. John's mother told the police that John had just come in and gone to bed. She told the police that John had been driving the car. She woke up John, who told the police that he had been home in bed all night. Then he admitted that he had been out, using the car, but initially lied so as not to worry his mother.

You discuss the police report with John and his parents. John says that he had been drinking heavily that night and does not remember where he had been, other than "out partying." His father says that he will take the stand and testify that John was in by 5:00 a.m. His mother says that she cannot remember when John came in relative to when the police came and prefers not to take the stand. Mr. Doe instructs you to try the case. John is equivocal. Mrs. Doe looks miserable.

At the pre-trial, by coincidence, the officer who was involved in John's first offense is present. He tells you that on the first go round, John was found in someone's house at 5:00 a.m., blind drunk. The homeowner had awakened to the sounds of a window smashing. He came down stairs with his loaded gun and would have blasted John but for the fact that he was stumbling around so much that the homeowner immediately recognized that he was drunk or very sick.

## Resolution

### "Activist Attorney"

Attorney A, convinced that John has a problem with alcohol, decides to encourage John to confront his problem and obtain treatment, and states that he will not accept the B & E case unless John agrees to do so. Attorney A, once he is convinced that John was indeed driving under the influence, also decides to accept the drunk driving case only on the same condition.

Attorney A considers his client to be John, not Mr. Doe, for purposes of representing John in the criminal cases. He believes that he has the responsibility to educate both John and his father about the relationship between alcohol and John's legal problems. See EC 2-1 ("an important function of the legal profession [is] to educate laymen to recognize their problems."); EC 7-8 ("Advice of a lawyer to his client need not be confined to purely legal considerations.")

Attorney A asks John's consent to disclose to the court and to the prosecutor the fact of John's underlying treatment during any sentencing stage.



### "Traditional Attorney"

Attorney T views his role purely as the provider of legal services to achieve the legal ends requested by his client as long as no ethical canons are broken. Attorney T does not see himself as either compelled or qualified to judge John's possible alcohol problem and thus agrees to take and defend zealously both the B & E case and the drunk driving case purely on their legal merits. See Canon 7 ("A lawyer should represent a client zealously within the bounds of the law"); DR 7-101(A)(1) ("A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law . . ."). Attorney T thus accepts both cases and treats them no differently from the way he would if John did not seem to have a persistent problem with alcohol.

## CHAPTER VI

### REPORT OF THE SUBCOMMITTEE ON EDUCATION

Based upon the evidence available to the members of the Subcommittee, we make the following recommendations:

1. In order for the relationship of alcoholism to law related matters to be effectively communicated to the responsible personnel within the legal system, a program of annual emphasis and education is recommended. It is particularly important that judges, lawyers, clerk/magistrates, probation officers, parole personnel and all other participants in the process of civil and criminal litigation receive both accurate and practical drug and alcohol information and the training to implement it.

2. The Massachusetts Bar Association through its Chemical Dependency Committee (and other programs) should provide statewide and local training programs focused upon lawyers in all professional specialties to emphasize identification, referral and treatment of alcoholics.

3. All training courses related to defense of criminal matters (particularly alcohol-related and violent offenses) should include specific information on identification, assessment and referral of alcoholics.

4. Massachusetts and national law schools should be encouraged to adopt curricula that include specific emphasis on identification, assessment and referral of alcoholics in legal ethics and clinical legal training programs, with sufficient emphasis by testing and essay requirements to insure that future members of the bar are exposed and sensitized to the issue and its management.

5. Prosecutors should be provided with specific training in identifying and associating certain conduct with alcoholism so that appropriate recommendations may be made in sentencing.

6. The Committee for Public Counsel and local bar advocate programs should include training in alcoholism. In each region professional alcohol counsellors should be available or on staff to public defenders.

7. The Chief Justices of the Trial Courts are strongly encouraged to assume the initiative to involve the judiciary in educational programs directly related to alcoholism, its identification, assessment and appropriate treatment. Specific emphasis should be made to encourage effective sentencing where alcoholism or other chemical abuse is evident. Effective sentencing should incorporate the need to provide sufficient incentive (incarceration if needed) to insure that alcohol intervention and treatment programs may have the necessary access and time to be effective.

8. The President of the Massachusetts Bar Association should bring the message to a monthly meeting of the Flaschner Judicial Institute concerning the problem of drug and alcohol abuse and periodic training for justices regarding disposition of cases involving drug or alcohol abuse.

9. The Massachusetts Bar Association should contact the Education Committee of the Clerks' Association of the Massachusetts Judges Conference for the purpose of developing or encouraging development of appropriate training programs for judges and clerk/magistrates on the issue of alcoholism, its identification, assessment and treatment.

10. The Criminal Justice Training Council should be involved in the preparation of materials regarding the alcohol issues discussed in this Report for distribution throughout the criminal justice system.

11. The Commissioner of Probation and his director of training should be contacted and enlisted in an ongoing and regular training program for probation officers on the subject of alcoholism identification, assessment and treatment. The probation officer program should be more rigorous than any other so that probation officers are alert to alcoholism as a problem not only at intake but also in the general management of individuals on probation.

12. It is inappropriate in any case where alcoholism is suspected (statistically significant) or evident that a probation be utterly unsupervised. Regular in-person meetings are an important tool in identifying, monitoring and reaching developing alcoholics.

13. The Chairman of the Parole Board should be enlisted to encourage the training of parole board members and parole officers with respect to alcoholism.

14. Each subcommittee of the Governor's/MBA Committee on the Alcoholic Client should develop essays for publication in Lawyer's Weekly on their subject matter of approximately 1,000 words so that each general subject area is developed and presented to members of the bar. It is a goal of the Education Subcommittee that an article relating alcoholism to legal matters appear in some form each month in Lawyer's Weekly.

15. Publishers of legal texts particularly in the area of ethics, criminal law and family law should be encouraged to include specific materials on alcoholism.

16. The Chemical Dependency Committee or some other appropriate arm of the Massachusetts Bar Association should provide specific referral service to the legal community of questions with respect to alcoholism and chemical dependency. One possible structure would be to have the Chemical Dependency Committee continue as an educational group, with the staff of the MBA's Lawyer Referral Service trained to provide assessment and treatment referral advice. It may be more efficient to have a statewide assessment and treatment referral service rather than one on a county basis.

17. The Education Subcommittee recommends that the Massachusetts Bar Foundation fund a pilot program to assist law schools in developing student and faculty involvement in expanding course material to include education with respect to the impact of the use and abuse of alcohol and drugs on the lawyer-client relationship.



18. We urge the President of the Massachusetts Bar Association and the Governor to articulate the great importance of developing alcohol education in our public schools beginning with kindergarten. The Committee is aware that this type of educational material is available and can be wisely and sensitively introduced as a part of a sound elementary school curriculum.

Respectfully Submitted,  
The Massachusetts Bar  
Association/Governor's  
Committee on the Alcoholic  
Client



